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Supreme Court of the United States.

OCTOBER TERM, 1902.

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JAMES H. McKENNEY,
Clerk.

No. 247.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY and JOHN H. JOHNSON, Sheriff and *ex officio* Treasurer of Wilkes County,
Petitioners,

vs.

W. N. COLER & COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR RESPONDENTS.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
CHARLES PRICE,
Of Counsel.

C. C. BURGOYNE, Walker and Centre Streets, N. Y.

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There is no doubt that Wilkes County and Forsyth County are in the same category. This we now proceed to show 11

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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 247.

The Board of Commissioners of Wilkes County and John H. Johnson, Sheriff and *ex officio* Treasurer of Wilkes County,
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vs.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR RESPONDENTS.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
CHARLES PRICE,
Of Counsel.

Statement of the Case.

This case was once before this Court on a certificate made by the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, propounding to this Court certain questions for instructions to guide the said judges in their disposition of this case. The decision of this case in answer to the said questions is reported in *Wilkes County vs. Coler*, 180 U. S., 506.

A copy of the bonds in question is set forth in the Record (p. 16).

There was double lawful legislative authority for the issuance of these bonds, namely (A) the ordinance adopted by the Constitutional Convention of North Carolina, March 9, 1868, and (B) the separate and independent authority of Sections 1996 to 2000 of the Code of North Carolina. The bonds were issued in conformity to said ordinance, and were also issued in conformity to the said sections of the Code.

After the decision of this Court in *Wilkes County vs. Coler*, 180 U. S., 506, and after the case went back, the Circuit Court of Appeals rendered the opinions (Record, pp. 110, 118), and entered the judgment (Record, p. 123), which the petitioners for *certiorari* now seek to review. The Circuit Court of Appeals followed the decision of Court, and found that the principles laid down by this Court required a judgment in favor of the validity of the bonds in question, and the Court of Appeals puts its judgment solely upon the effect of the ordinance adopted by the Constitutional Convention, March 9, 1868, which is so fully discussed by this Court, and, doing so, the Circuit Court of Appeals found it unnecessary to con-

sider the other source of authority for the issue of these bonds—to wit, the Code, Sections 1996-2000.

By referring to the questions certified to this Court, and which were answered in the case of *Wilkes County vs. Coler, supra*, it will be seen that one of the cases referred to in the first question certified to this Court was as to the duty of the United States Court to follow the decision sf the Supreme Court of North Carolina in the case of *Wilkes County vs. Call* (123 N. C., 108, A. D. 1898). This Court held that it was not the duty of the Circuit Court of Appeals to follow that case so far as the ordinance of 1868 of the Constitutional Convention was concerned, basing this conclusion upon the *Belo case* (A. D. 1877) and the *Hill case* (1870), which had been decided years before by the same Supreme Court of North Carolina in respect of this very ordinance of 1868, but that it was its duty to follow the *Belo case* and the *Hill case.*

In the application for *certiorari* the petitioners attempt to re-discuss and to have brought again into review the effect of the said ordinance of the Constitutional Convention and the effect of the decision of the Supreme Court of North Carolina in the case of *Wilkes County against Call.*

The leading argument made by the petitioners' counsel for the writ of *certiorari* is based upon the misconception that there is necessarily involved in this record a conflict between the Circuit Court of Appeals and the Supreme Court of North Carolina. Not so.

If there is any conflict, it is between the *earlier* decisions of the North Carolina Supreme Court in the *Belo case* and *Hill case*, made before these bonds were issued, and the later decision of the same Court in the *Call case (Commissioners of Wilkes Co. vs. Call*, 123

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If there is any conflict between the decision of the Supreme Court of North Carolina in *Wilkes County vs. Call*, just cited, and the Federal Courts that conflict is not with the Circuit Court of Appeals, but with the Supreme Court of the United States, and with its decision in the case of *Wilkes County vs. Coler*, 180 U. S., 506.

These bonds were issued in the year 1889, in aid of the railroad into Wilkes county.

The railroad was constructed, and has been in operation ever since.

Interest was paid by the county upon these bonds for many years after their issuance, and the bonds are owned by *bona fide* holders who have paid full value therefor.

The words of Mr. Justice PECKHAM in *Tulare Irrigation District vs. Shepard*, 185 U. S., 1, are in point where he states (page 8):

"It is agreed in the statement of facts in this case that the moneys received from the sale of the bonds in suit were applied to building and constructing the irrigation works now in use by the defendant corporation. It has, therefore, received the full consideration for which the bonds were issued, has built its works with the proceeds, and uses such works for the purposes intended. Notwithstanding these facts, it now refuses to pay the bonds or the interest thereon, and, while acting as a corporation, at all times, still sets up that it was never legally organized, and hence had no legal right to issue any bonds.

"In the case of *Douglas County Commissioners v. Bolles*, 94 U. S., 104, 110, a case involving facts somewhat similar, this court said: 'Common honesty demands that a debt thus incurred should be paid.' That

sentiment has lost no force by the lapse of time, and we think it applies in its full strength to this case. Unless there be some settled rule of law which prevents a recovery in this action, the judgment under review should be affirmed."

In 1898, years after these bonds had been issued and sold, the Supreme Court of North Carolina, in the case of *Commissioners of Wilkes County vs. Call*, 123 N. C., 308, which was a simulated and collusive case, being brought by the Commissioners of Wilkes County against the treasurer of Wilkes county, rendered a decision by a bare majority, in which the county treasurer was enjoined from paying interest on these bonds. The record in the official report, 123 N. C., 308, states the counsel appearing as follows:

"Mr. *A. C. Avery* for plaintiffs; no counsel *contra*."

The answer of Call, the treasurer of Wilkes County, (the defendant in the case of *Commissioners of Wilkes County vs. Call*, 123 N. C., 308), which was filed in this present case in the United States Circuit Court (Record, page 79) states among other things:

"It was after this defendant's positive*ly* refusal to carry up said appeal that Welborn and Turner by some means unknown to this defendant became parties to said proceedings and the appeal by them was perfected and the case carried to the Supreme Court of North Carolina, and while Judge STARBUCK'S decision was affirmed, *the cost of said appeal was paid by Wilkes County*. That this defendant was Treasurer of Wilkes County for four years, and that he never heard of Welborn or Turner owning a bond until about the time they became parties to said suit."

The affidavit of L. C. JENNINGS, one of the County Commissioners of Wilkes County, in this case (Record, page 86), states among other things:

"The defendant Call appeared before the Board and advised them that it was their duty to pay off the bill

of costs against J. M. Turner and J. W. Welborn sent down by the Supreme Court, which he said that he had paid, relying on having it allowed in his settlement as retiring sheriff of the county, *and being inexperienced the Board confided in Call's representation as to their duty and credited him with the amount of said bills.*"

It thus appears that on Call's refusal to take an appeal to the Supreme Court of North Carolina, Welborn and Turner (who together became the joint owners of *one* bond after the suit was brought in the North Carolina State Court, see answer of J. M. Welborn and J. M. Turner, Record, page 69) took an appeal to the Supreme Court of North Carolina, and that the expenses of said Welborn and Turner in taking such appeal, and the costs against them awarded by the Supreme Court of North Carolina, were paid by the County of Wilkes.

FURCHES, Chief Justice, with whom concurred FAIRCLOTH, late Chief Justice, N. C., says (123 N. C., 336):

"The Court, in its opinion, says that certain positions were strenuously insisted on by the defendants. I think this must be a mistake, as this case was not argued before us, either by brief or by oral argument on behalf of the defendants. Mr. Turner and Mr. Wellborn, by leave of the Court, made themselves parties defendant after the action was brought, but they have given the case no further attention. Why they did this I do not know. * * * But, as to the conduct of the case before this Court, it has been unilateral."

Justice DOUGLAS, in his opinion, *Commissioners vs. Call*, 123 N. C., 308, concerning these Wilkes County bonds, said:

"The bondholders themselves *could* have become parties to any such proceedings, and *would* have been gladly heard by us, but the mere fact that *they deliberately refrained from any participation in the defense*," etc., etc.

The learned Justice thus shows *that he did not believe*, from the record, that Turner and Wellborn were *bona fide* holders of even *one* bond, or, that they actually participated in the defense of the case in the State Court.

The truth is (although the counsel for plaintiffs did not call the attention of the Court to the fact), the case was before the Court, erroneously, because the time in which the appeal was to be perfected, had expired, before Turner and Wellborn were made parties (Record, pp. 69-72).

After the decision of the Supreme Court of North Carolina, in the said case of *Wilkes County Commissioners vs. Call*, 123 N. C., 308, this same Turner and Wellborn, whose expenses and costs in the Supreme Court of North Carolina were paid by the County of Wilkes, undertook to sue out a writ of error bringing that case to the Supreme Court of the United States, and the case came before this Court as *Turner vs. Wilkes County Commissioners*, 173 U. S., 461, and this Court, of course, promptly dismissed the writ of error because no Federal question was involved.

It is this decision of the North Carolina Supreme Court, in this one-sided case, with counsel only on one side, and rendered by a bare majority of the court, which the learned counsel for the county—the same learned counsel that appeared in the Supreme Court of North Carolina in that case—now claims is binding as an authority upon the United States courts in this action brought by the bondholders for the interest on their bonds. The proposition is monstrous. The bondholders who now have brought this action in the United States courts were not represented in the Supreme Court of North Carolina, nor was any other

bondholder represented there. No arguments were made on behalf of the bondholders there. It does not appear but that if bondholders had been present, and if counsel had represented them, and presented arguments to the Court, that Court would have decided precisely as did the United States Circuit Court of Appeals in the present case. Indeed, we think it is clear, and that this Court also will see from the opinions of Judges MORRIS and BOYD and from our brief, that upon the presentation of the case for the bondholders only one conclusion can possibly be reached, namely, that these bonds are valid and enforceable against the County of Wilkes.

The question presented on this writ of *certiorari* is very short: Is the decision of the Circuit Court of Appeals right? If it is, that ends the controversy, and without reference to the decision of the collusive and simulated case of *Commissioners of Wilkes County vs. Call*, 123 N. C., 308.

For the convenience of the Court we have printed in an APPENDIX at the end of this brief various provisions of the Constitution of North Carolina, the ordinance of the Constitutional Convention, and Statutes of North Carolina, which this Court may desire to refer to or examine in connection with this case, and give references to places in the record, where the statutes not here reprinted may be found printed in full.

Argument.

INTRODUCTORY STATEMENT.

This case comes for argument upon the whole record. Of course the answers by the Supreme Court of the

United States to the certified questions have settled the propositions or questions covered thereby.

The Court gave limited answers to the questions, in substance, as follows (180 U. S., 506; and present Record, p. 109):

"1. That the Circuit Court should have regarded the decisions set out in the questions as controlling upon the inquiry, whether the legislative enactments of 1868, 1879 and 1881 were passed in such manner as to become, under the Constitution, laws of the State.

"2. That the rights of the parties in this case are determinable by the law of the State, as it was declared by the State Court to be at the time the bonds here involved were made in the name of the County and put upon the market."

We have read carefully the opinion of this Court, delivered by Mr. Justice HARLAN, in *Wilkes County vs. Coler*, 180 U. S., 506. The Court answers the questions only to a certain extent, but not fully as certified, and is careful so to state (see p. 533). We understand that the opinion and the answers given to the questions reserved from their operation and effect the question whether the Convention ordinance of March 9, 1868, did not itself, aside from and independent of the legislation of 1868, 1879 and 1881, give full power and authority to Wilkes County to issue the bonds in question.

This Court distinctly stated that the said ordinance of March 9, 1868, was valid, and was in force after the Constitution was adopted, and that the Supreme Court of North Carolina had so held in the Hill and Belo cases with respect to Forsyth County bonds.

This settles the objection so much urged on the other side, based on certain decisions or dicta of the Supreme Court of North Carolina, all made long after these bonds were issued, that all unexecuted powers to take stock in railroads and issue bonds were annulled by the Constitution when it went into effect. Mr. Justice HARLAN expressly stated that the *Belo* case held that the said ordinance of March 9, 1868, conferred the authority upon *Forsyth County* to make the subscription, and that this was so independently of the act of August, 1868, or of any other legislation (p. 529).

The learned Justice says at page 529:

"Forsyth County—whose liability on the bonds in suit in that case was directly involved—made the point that it had no authority to issue such bonds. The court, however, held that such authority was conferred by the Convention ordinance of March 9, 1868, and the subscription and bonds made in the name of that county to the North Western North Carolina Railroad Company were upheld as valid *under that ordinance*, which was recognized as part of the law of the State and as conferring authority on the county of Forsyth to do what it did.

"It results that when the bonds here in question were issued in 1889, it was the law of North Carolina that the ordinance of 1868, constituting the charter of the North Western North Carolina Railroad Company, was not superseded by the constitution of 1868, but was *in force* and therefore gave power to counties *embraced by its provisions* to take stock in that company and pay for it in county bonds, just as Forsyth County had done."

As to *Wilkes county*, Justice HARLAN states the question to be as follows, to wit (p. 529):

"Whether Wilkes county was so situated with reference to the contemplated road that it could be said to have had the same authority as was given to Forsyth county,"

which question he states "is not now decided." On page 532 he says:

"Was Wilkes county in the same category with Forsyth county?"

In short, if Wilkes County is in the same category with Forsyth County, then it stands decided by the Supreme Court of the United States that the said Ordinance of March 9, 1868, does, *per se*, give to Wilkes County the authority to issue the bonds in question, irrespective of the legislation of 1868, 1879 and 1881, so that the only question under said ordinance now is whether Wilkes County is in the same category with Forsyth County. If so, then the answer of the Supreme Court to the second question applies, which is that the rights of the parties in the Wilkes County case are determinable by the law of the State as it was decided by the State Court to be at the time when the Wilkes County bonds were put upon the market. It results, therefore, that, if Wilkes County is in the same category with Forsyth County, the question is conclusively decided in our favor by the former opinion of the Supreme Court of the United States in the present case, without anything more, and the Circuit Court of Appeals committed no error in affirming the judgment of the Circuit Court in this, the Wilkes County, case.

There is no doubt that Wilkes County and Forsyth County are in the same category. This we now proceed to show.

I.

The ordinance enacted by the Constitutional Convention of the State of North Carolina, March 9, 1868, entitled "An Ordinance to incorporate the Northwestern North Carolina Railroad Company," gave per se, clear and complete authority to issue the bonds in question, and that said ordinance gave such authority was twice expressly decided by the Supreme Court of North Carolina before the said bonds were issued.

The Constitutional Convention of the State of North Carolina enacted an ordinance to incorporate the Northwestern North Carolina Railroad Company, ratified March 9, 1868, printed in the record in this case, pages 10–13. This ordinance provided in Section One:

"That, for the purpose of constructing a railroad of one or more tracks, from some point on the North Carolina Railroad, between the town of Greensboro, in Guilford County, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the State, to be hereafter determined, a company is hereby incorporated under the name and style of the Northwestern North Carolina Railroad Company, with a capital stock of two millions of dollars, which shall have a corporate existence as a body politic for the space of ninety-nine years," etc.

Section 2 of the said ordinance provided:

"Be it further ordained, That **the capital stock of said company may be created by subscriptions on the part of** individuals, corporations **and counties**, in shares of one hundred dollars."

Section 12 of said ordinance provided :

" Be it further ordained, That the stockholders of said company may pay the stock subscribed by them either in money, labor or material for constructing said road, as the board of directors may determine, **and that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company.**"

" The act incorporating the North Carolina and Atlantic Railroad Company," referred to in the said Section 12 of the said ordinance, is the act, Chapter 136, of the Laws of North Carolina, session of 1852, Sections 33 to 37 of which are printed in the record (pp. 54, 55), and said Sections 33 to 37 are by such reference adopted and made part of said ordinance. These sections there quoted are the only material and pertinent sections of the said act of 1852, and are the only sections thereof which relate to county or municipal subscriptions.

Section 33 of the said Act of 1852 provides :

" It shall be lawful for **any incorporated town or county, near or through which said railroad may pass,** to subscribe for such an amount of stock in said company as they shall be authorized to do by the inhabitants of said town or the citizens of said county, in manner and form as hereinafter provided " (Record, p. 54).

The language of Section 2 of the ordinance above quoted includes Wilkes County—that " the capital stock of said company may be created by subscriptions on the part of individuals, corporations and *counties.*"

So also the language of Section 12 of said ordinance includes Wilkes County—"*all* counties or towns subscribing stock." The said Section 2 and the said Section 12, if standing alone, would clearly include counties generally, and, among them, Wilkes County. The said Section 33 of the Act of 1852 provides that "it shall be lawful for *any incorporated town or county near or through which said railroad may pass.*" If this operates in any way to restrict the otherwise general language of the said Sections 2 and 12 in the ordinance of 1868, it is, nevertheless, perfectly clear that the County of Wilkes is embraced within the language of said Section 33.

A glance at the map of the State of North Carolina shows that a railroad constructed on the route described in the Convention ordinance of March 9, 1868, namely, "from some point on the North Carolina Railroad between the town of Greensboro, in Guilford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, to some point on the northwestern boundary line of the state," must necessarily pass "near or through" Wilkes County.

The demonstration, therefore, is complete, that the said ordinance of the Constitutional Convention of March 9, 1868 expressly authorized the county of Wilkes to subscribe for stock in the said railroad company. It is also perfectly clear that the said county of Wilkes was authorized by the said ordinance of 1868, and by the said act of 1852, which was referred to in Section 12 of said ordinance, to issue under the sanction of a popular vote, bonds of the county in payment of such

subscription to said stock. Section 34 of the said act of 1852 provides that the justices of peace of the county may make an order for an election of the qualified voters of the county. Section 35 of said act of 1852 expressly provides for the issue of county bonds:

"That if, upon the return of such constable and of such sheriff, it shall appear that a majority of the qualified voters of such town, and by the return of the sheriff that a majority of the qualified voters of such county, voting upon the question, are in favor of the subscription, the corporate authorities of such town **and the justices of such county shall appoint an agent to make the subscription in behalf of such town and county, to be paid for in the bonds of such town and county, and on such time as shall be agreed on by said town officers and the justices of said county**" (Record, p. 54).

The language of Section 12 of the said ordinance (quoted *supra*,) is "that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company." The method of making the subscription, the method of paying such subscription—namely, in the bonds of such county—and all the other things in the said act of 1852 relating to the method of making the said subscription and paying the said subscription are, by this reference, incorporated into, and are a part of, the said ordinance of 1868. The method of paying said subscription—namely, by the bonds of the county—is as much a part of the said ordinance as are the other provisions of the act of 1852 in regard to the making of the said subscription. It was so held, prior to the issue of the bonds now in suit, by the Supreme Court

of North Carolina in the two *Forsyth County cases* of *Hill* and *Belo* below fully stated. *No other method of paying the said subscription is provided for, either in the said ordinance or in the said act of 1852.* Such a construction must be placed upon the ordinance and act as will render them effective and not nugatory.

The bonds in suit were duly authorized by a vote of a majority of the qualified voters of Wilkes County. This is admitted on the record.

THE SAID BONDS now in controversy recite that they are

" authorized by a vote of a majority of the qualified voters of Wilkes county, by an election regularly held for that purpose on the sixth day of November, A. D. 1889, and by an order of the Board of Commissioners of Wilkes county [the said Board of Commissioners having conferred upon them, under the constitution of 1868 and the code of North Carolina, the same power which the justices of the peace formerly had] made on the first day of April, A. D. 1889. This series of bonds is issued to pay the subscription of $100,000 made to the capital stock of the Northwestern North Carolina Railroad Company by said county of Wilkes " (Record p. 16).

THE COMPLAINT in the present case alleges (Record, p. 7, paragraph 22):

" That the county of Wilkes, acting through its Board of Commissioners, and in accordance with the ordinance and acts as above set out, subscribed the sum of $100,000 to the capital stock of the Northwestern North Carolina Railroad Company, a proposition to subscribe the said amount having been submitted to the qualified voters of the county at an election held according to law, and a large majority of the said qualified voters having voted in favor of the same."

THE ANSWER of the county commissioners (Record, p. 27, paragraph 22) avers:

"These respondents, still denying the authority of the former commissioners to issue bonds or subscribe to the capital stock of the said company, admited that they did subscribe and issue bonds in the amounts alleged in the complaint, and that it was ascertained and declared that a majority of the qualified voters of Wilkes county had voted in favor of making such subscription, and that it is now too late to question said finding as to said vote."

The Railroad was actually constructed in Wilkes County. This is admitted on the record.

It is also stated in the complaint (Record, p. 7, paragraph 23) that the said railroad was constructed in the said county of Wilkes, "and is the only one running within the limits of the county, and has been taxed by the county each and every year since its construction." The answer of the county commissioners (Record, p. 33, paragraph 27) also *admits the completion of the said railroad to Wilkesboro, in the said county of Wilkes.*

We have thus shown that even if this were an original proposition, which had never been passed upon by the Supreme Court of North Carolina, the said ordinance of 1868, standing by itself alone, was and is, *per se*, sufficient authority for the issue of these bonds of Wilkes county. It is not pretended or alleged by anybody that there is any act of the legis-

lature repealing, or attempting to repeal, the said ordinance.

But we do not need to depend upon showing the correctness of this proposition as an original question. The point has been expressly adjudged by the Supreme Court of North Carolina in two cases, decided respectively in 1870 and 1877, known as the Hill and Belo cases, and these cases are conclusive in favor of the proposition that the said ordinance of 1868 was not repealed or affected by the constitution and that said ordinance gave, per se, lawful authority to issue county railroad aid bonds, and the Supreme Court of the United States so holds (180 U. S., 506, *supra*).

Hill vs. Commissioners of Forsyth County, 67 N. C., 367 (June Term, 1870).

Belo vs. Commissioners of Forsyth County, 76 N. C., 489 (January Term, 1877).

The Original Convention Ordinance of March 9, 1868, authorized the railroad in Wilkes County in aid of which the bonds were voted, independently of the Act of February 20, 1879.

RE MAIN LINE AND BRANCHES.

We understand the learned counsel for the Wilkes County to argue that the particular railroad constructed in Wilkes County, in respect of which the bonds in question in the present case were issued, was a **new**

branch line, and was not authorized until the passage of the act of February 20, 1879. [The said act is reprinted in the Record, page 14.] In making this argument, however, the learned counsel is clearly mistaken in his facts. The language of Section 1 of said ordinance of March 9, 1868, printed in the Record in this case, page 10, is

"a railroad of one or more tracks from some point on the North Carolina Railroad, between the town of Greensboro, in Guilford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, *to some point in the northwestern boundary line* of the state, to be hereafter determined, a company is hereby incorporated," etc.

Now, a glance at the map of the State of North Carolina shows that such a railroad to the "northwestern boundary line of the state" **must necessarily pass "near or through" Wilkes county.** The northwestern boundary line of the State is the line which is reached by going in a northwesterly direction "from some point on the North Carolina Railroad, between the town of Greensboro, in Guilford County, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county." This is the **main line** of the railroad as contemplated by the said ordinance of March 9, 1868; and that railroad, in respect of which the bonds were issued in the present case, is a part of such main line of railroad. It is true that the said road has not been constructed, we believe, beyond the town of Wilkesboro, in Wilkes County, and that the point on the northwestern boundary line of the State has not yet been determined, as indeed it has not been necessary to determine it, because the railroad has not yet reached, or approached near to that boundary

line, and the said ordinance did not prescribe any limit of time within which the said road should be constructed to the said northwestern boundary line.

When Section 1 of the said ordinance said the "*northwestern* boundary line of the state," it meant precisely what it said. It did not mean the *northern* boundary line of the State, to which the learned counsel for the appellants pointed in his former oral argument of this case in the United States Supreme Court. Not only is this obvious from reading this express language of Section 1 of the ordinance, but it is also further obvious from the language of Section 13 of the said ordinance (Record, p. 13), as follows, to wit:

"Be it further ordained, That the company shall have power to construct branches of said road, one of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surry county, to the line of the State of Virginia."

When, therefore, the Constitutional Convention meant the *northern* boundary line of the State, to wit, the line of the State of Virginia, it said so, and described the line as "the line of the State of Virginia," which is a wholly different thing from the *northwestern* boundary line of the State mentioned in Section 1 of the said ordinance.

Furthermore, the topography of the country is such that the line of railroad described in Section 1 of the said ordinance, to wit, "a railroad of one or more tracks from some point on the North Carolina Railroad, between the town of Greensboro in Guilford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the state" must necessarily pass "*near or through*"

Wilkes County. Such a road would naturally run up the valley of the Yadkin river through Wilkes county. This is the only natural and practicable route, and was the one intended and prescribed by the said ordinance of March 9, 1868. On either side of this Yadkin valley are high hills and mountains, and this Yadkin valley forms the natural and only proper route for a railroad from the points mentioned to the northwestern boundary line of the state. In view of these facts of physical geography, well known to the Constitutional Convention which enacted the ordinance, this Section 1 is in reality as specific as if the said Convention had prescribed in express terms that this road should go up the Yadkin valley through Wilkes county, mentioning that county by name.

But, in any view, the road must necessarily run "*near or through*" *Wilkes county*, and that is the material thing, and the only material thing.

But in order to hold that the said ordinance of March 9, 1898, authorized the construction of the railroad in Wilkes county, and the issue of the bonds in question in respect thereof, **it is not necessary that the said line of railroad in Wilkes county shall be deemed a part of the main line** of the same road, although it clearly was part of the main line. Section 13 of the said ordinance above quoted provides (Record, p. 13):

"That the company shall have power to construct *branches of said road*, one of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surrey county, to the line of the State of Virginia."

The road in question is not a branch which runs from Winston and Salem by way of Mount Airy, but that was only one of the branches which the said Sec-

tion 13 authorized the said company to construct. It was also authorized by said Section 13 to construct other branches. Even if the said railroad in Wilkes county is to be regarded as a branch of said railroad (although, as we have shown above, it is to be regarded not as a branch, but as main line), yet these bonds now in question were properly authorized by the said ordinance to aid in the construction of such branch.

The railroad in question is not a "branch," but a part of the "main line" originally authorized by the Ordinance of the Constitutional Convention passed March 9, 1868, but even if it were a "branch" the road was authorized and the bonds are valid.

RE ACT OF FEBRUARY 20, 1879.

It is argued by the learned counsel for the county that the act of February 20, 1879 (reprinted in Record at p. 14), was the first authority for the construction of this railroad in Wilkes county, in aid of which the bonds in question were issued. The learned counsel says that the act of 1879 amends Section 13 of the original charter by adding the words

"and one of which [branches] shall be constructed from the town of Winston and Salem, up the Valley of the Yadkin, by way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's factory in the county of Caldwell, which branch shall be known as second division" (Rec., p. 14).

The learned counsel in one breadth argues that this act of February 20, 1879, is totally invalid, because

the ayes and noes do not appear on the House journal in the second reading, and in the next breath he argues that this railroad in Wilkes county is a *new* road, and was not authorized by the ordinance of March 9, 1868, because this act of 1879 speaks of this road as a branch. In other words, the learned counsel for the county is arguing that this Act of 1879 (although according to his contention it is *totally* invalid —we show later on that it is *not totally* invalid) is to be held valid so far as making this railroad in Wilkes County a "branch" line and not a part of the main line, although it would be a part of the main line if this Act of 1879 had not been passed. It is a little difficult, to say the least, to see how, if this Act of 1879 is *totally* invalid, it can possibly have any effect to convert what would otherwise be a part of the main line of railroad into a "branch." **But, even so, it would still be "railroad" and would run "near or through" Wilkes County, as much so if called a "branch" as if called "main" line.** The law deals with things, and not mere names, given by an invalid act, even if the Act of February 20, 1879 were invalid throughout.

There is no magic in the name "branch," and it is immaterial in the construction of the ordinance of March 9, 1868, whether the act of February 20, 1879, passed ten years afterwards, and by a different body of men, speaks of this road as a "branch." The real question is whether this railroad was authorized by the ordinance of March 9, 1868, be it called a "branch" or "main line." As to this fact there can be no possible question.

Even if this railroad constructed in Wilkes County is a branch, it was authorized by Section 13 of the

original ordinance, although said Section 13 of the original ordinance did not make it mandatory upon the railroad to construct the same, this *mandatory* provision being first inserted in the Act of February 20, 1879, and even if this railroad in Wilkes County were to be called a "branch," it was, nevertheless, authorized by the said convention ordinance of March 9, 1868, and that ordinance authorized the issue of bonds to aid in the construction thereof.

The power to issue bonds was conferred upon any county "near or through which said railroad may pass." This power was given whether the said railroad was what is called "main line" or "branch."

The language of the act is "near or through which *said railroad* may pass"—that is, whether the said railroad be what may be called main line or branch, the power was expressly given by said section 13 of the ordinance to construct branches—and even if this railroad into Wilkes County were to be regarded as a branch under the said ordinance of 1868 (and clearly it should not be), still there was clear power for Wilkes County under the said ordinance to issue said bonds, for this was, in any view, a "railroad" of said company, which passed "near or through" Wilkes County. On no theory can it be urged that what runs into Wilkes County is not "railroad," and railroad of the Northwestern North Carolina Railroad Company, and this railroad passes "near or through" Wilkes County, and, therefore, the said County of Wilkes was expressly authorized by the said ordinance to issue the bonds now in question, and this is so whether

the said railroad be called a branch, under Section 13 of the said ordinance, or whether it may be regarded as main line.

The learned counsel for the county seeks to argue that because the Act of February 20, 1879 (if the journals had shown that it was properly enacted by the Legislature), undertook to authorize the construction of the railroad into Wilkes County and the issue of bonds by the county in aid thereof, therefore, the said ordinance of 1868 had not authorized the said railroad nor the issue bonds. A more complete *non sequitur* it would be hard to find.

It frequently happens that out of abundant and extra caution a second act is passed, which undertakes to confer an authority which has already been given by a preceding enactment. The question whether or not such second enactment confers the authority is wholly immaterial as affecting the question whether the first enactment conferred the authority. Especially is this true when the second enactment was passed by a different body of men in the Legislature, more than ten years after the original enactment. This second body of men obviously had no right or power or authority to determine in 1879 whether the ordinance of 1868 conferred the authority or not, and, as a practical matter, the Act of 1879 was, of course, passed by the Legislature without any definite or careful consideration of the question whether or not the authority already existed.

A similar second authority was attempted to be conferred in the case of the bonds of Forsyth County, in question in the *Hill* and *Belo* cases, above cited, in respect of which the Legislature passed a second act—namely, the act passed the 11th of August, 1868,

which second act undertook to ratify and approve the issue of the said Forsyth County bonds. The Supreme Court of North Carolina, however, held that the original ordinance authorized the issue of the said bonds, and so, also, the Supreme Court of the United States in the present case (180 U. S., 506) decided that the Supreme Court of North Carolina thus held, and that this ordinance authorized the issue of the county railroad aid bonds independently of the said second act of August 11, 1868.

The precise question is whether the ordinance of 1868 authorized the construction of a railroad by the Northwestern North Carolina Railroad Company "near or through" Wilkes County.

What may or may not have been authorized by the act of February 20, 1879, is wholly immaterial to this question, for, if the ordinance of 1868 authorized the construction of a railroad "near or through" Wilkes county, then the said ordinance also gave authority to Wilkes county to issue county bonds to aid in the construction of such railroad. The language of Section 1 of the ordinance is (Record, p. 10):

"A railroad of one or more tracks, from some point on the North Carolina Railroad, between the town of Greensboro, in Guilford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county to some point in the northwestern boundary line of the State, to be hereafter determined," etc.

There can be no doubt whatever that a railroad running from the initial point on the North Carolina railroad, by way of Salem and Winston, "to some point on the northwestern boundary line of the State," is such a railroad; that is, is a railroad authorized by the said ordinance.

It was not necessary to have any legislation such as that attempted in said act of February 20, 1879, in order to determine the route of the railroad or to permit the railroad company to construct its railroad "near or through" Wilkes County. The ordinance of 1868 was complete without any aid whatever from said act of February 20, 1879.

RE ROUTE OF RAILROAD AND ITS DETERMINATION.

This language of said Section 1, above quoted, of said ordinance, leaves to be determined only the "POINT *in the northwestern boundary line of the State.*" The learned counsel for the appellants attempts to argue as if the said ordinance had prescribed that the *route* of the said railroad should be hereafter determined before the railroad could be constructed through Wilkes county. There is no such language in the said ordinance. The only thing that is to be hereafter determined is the "point in the northwestern boundary line of the state," to which the said road shall run. That point has never yet been determined. The learned counsel for the county argues as if the said act of February 20, 1879, was an act which had been passed to determine something which was by said ordinance expressly required to be hereafter determined before the railroad could be constructed through Wilkes county. The act of February 20, 1879, does no such thing. It does not determine the "point in the northwestern boundary line of the state" to which the said road shall run.

The words in the said Section 1, "to be hereafter determined," may mean either

that the company is to determine such point or that the legislative body of the State is to determine it.

It is immaterial for the purposes of this case, by which one the determination is to be made. It would be a sound and proper construction of said words to hold that such determination is to be made by the railroad company and not by any legislative body. Such holding would be in harmony with the express provision of Section 5, which is (Record, p. 11):

> "That after the organization of said company and the election of a president and other necessary officers, the officers so elected shall proceed under the advice of the directors to locate the eastern terminus of the Northwestern North Carolina Railroad," etc.

In other words, this Section 5 gave the company the right to locate the *eastern* terminus of the road at "some point on the North Carolina Railroad between the town of Greensboro, in Guilford County, and the town of Lexington, in Davidson County" (see section 1). There would be nothing strange or inconsistent with the scheme of the ordinance if it were to be held that the "point in the northwestern boundary line of the state, to be hereafter determined," was likewise to be determined *by the company itself*. On the contrary, it is the natural construction and conformable to the general practice that the company determines matters of this nature unless it is otherwise specifically provided. Suppose, however, the words "to be hereafter determined" mean that the Legislature of the State should designate a point in the northwestern boundary line of the State to which the road should run. Then the road already constructed through Wilkes County can be continued to such point as shall be so designated by the

Legislature. This road would then be a road exactly within the description of the said Section 1 of the said ordinance, for it would be a road from the initial point, "running by way of Salem and Winston, in Forsyth County, to some point in the northwestern boundary line of the state," to a point which had been determined by the legislative body—if the determination must be made by the legislative body.

Route Is Not Left to be Hereafter Determined.

The intervening *route* between Salem and Winston and the "point in the northwestern boundary line of the state" is not in any way required to be "hereafter" determined by the legislative body. Such *route*, or at least such route for a distance which will make said road run "near or through" Wilkes County, is left open to be determined by the company.

The learned counsel for the county, however, undertakes to argue as if the railroad company must wait until the "point in the northwestern boundary line of the state" has been determined by the legislature, or until a route has been determined, before the company proceeds to construct any part of its railroad "near or through" Wilkes County. In support of such argument he urges that some point in the northwestern boundary line of the State might be designated by the Legislature which would make the route through Wilkes County not the shortest route to such point in the northwestern boundary line of the State. This fact, however, that the route through Wilkes County might not in such an event be the shortest line is clearly immaterial. But a glance at the map shows

that such route would in fact be the shortest practicable route.

But suppose that the argument of the learned counsel for the county be true, and that it is necessary for such road to go by way of the shortest route, still Wilkes County would be a county "*near or through*" which the said railroad *must* run. A glance at a map showing the geography of the country makes this conclusion inevitable. We respectfully ask the Court to look at any standard and official map of the State of North Carolina, and of the region mentioned in the said ordinance, and we respectfully call the attention of this Court to the fact that whichever way a railroad may run "by way of Salem and Winston, in Forsyth County," to some "point in the northwestern boundary line of the state," such railroad *must run* "*near or through*" *Wilkes County*. The railroad company was, therefore, beyond any question, expressly authorized by the said ordinance of 1868 to construct the said railroad "near or through" Wilkes County, and the said county was by the said ordinance expressly authorized to issue the bonds now in question.

The definite location of the route of this railroad where it has been constructed into Wilkes County has been assented to by all the parties interested: (1) The Railroad Company, (2) the County of Wilkes and (3) the State of North Carolina.

The definite location (1) was made by the *Railroad Company;* (2) it was assented to by the *County of*

Wilkes, for in the order calling the election to vote on the question of issuing the bonds of Wilkes County (Record, page 38), and in the order of the County Commissioners making the subscription (Record, page 40), and in the contract with the Railroad Company (Record, page 42), and in the order issuing the Wilkes County bonds now in question (Record, page 44), this definite route of the road is distinctly set forth. The county, therefore, is estopped from objecting that this definite route of the road in Wilkes County is not authorized. (3) *The State of North Carolina*, which alone could question the authority to make this definite location of the route, has never questioned this location in the least. No *quo warranto* has ever been brought by the State to compel the company to remove its road. Furthermore, the action taken by the State in the first section of the Act of February 20, 1879, which section is clearly valid under the North Carolina Constitution, shows that the State expressly assented to the construction of the road in the place where it was thus definitely located and actually constructed and put in operation.

In *Tulare Irrigation District vs. Shepard*, 185 U. S., 1, this Court held that even if the irrigation district there in question was only a *de facto* corporation, that neither the district itself nor any taxpayer in the district could question the validity of the bonds on that ground, that the State only could question the corporate existence of the district in *quo warranto* proceedings. So, here it is obvious that the County of Wilkes, having assented to the location of the road, and having voted bonds in aid of the company whose road was thus to be constructed, and was actually constructed, could not for one moment be heard in this Court or

any other to allege that the definite location of the road was not authorized. The State alone in *quo warranto* proceedings against the Railroad Company could make any such question, and even the State would not be successful in any such attempt, because the charter of the company clearly gave it authority to locate and construct the road where it was located and constructed and where it has ever since been and is now in full operation. It is, in fact, as appears in the record, the only railroad, which down to the present, is in existence in the County of Wilkes.

Neither further legislation making a definite location of the route of the railroad nor the determination of "the point in the northwestern boundary line of the state" is made a condition precedent to a subscription by the county to the capital stock of the railroad company nor the issuing of bonds in payment of such subscription. Inasmuch as Wilkes County is a county "near or through" which the railroad must run in order to reach a "point in the northwestern boundary line of the state," Wilkes County was by the ordinance authorized to make a subscription to the capital stock of this railroad company and to issue its bonds in payment of such subscription, the only condition precedent being a vote of a majority of the qualified voters, which vote was had.

FIXING THE POINT OF TERMINUS ON NORTHWESTERN BOUNDARY LINE OF THE STATE NOT A CONDITION PRECEDENT TO VOTING AID BY WILKES COUNTY.

The learned counsel for the county has attempted to argue as if some further statute was necessary after the ordinance of 1868 before Wilkes County could subscribe to the stock of the railroad company or issue its bonds in payment of such subscription. The learned counsel seems to argue that some further legislation is necessary *definitely locating the route* of the railroad "near or through" Wilkes County or *definitely fixing the "point* in the northwestern boundary line of the state." Any such view is clearly erroneus. There is not one word in the ordinance of 1868 to support any such view. No language in that ordinance requires any further legislation definitely locating the route of the road, or further legislation locating it at all, generally or definitely. But even if it did, no language of the ordinance makes any such thing a *condition precedent* to the subscription to the capital stock or to the construction of the road. The general route of the road is located by the ordinance itself as follows:

"From some point on the North Carolina Railroad between the town of Greensboro in Guilford County, and the Town of Lexington in Davidson County, running by way of Salem and Winston in Forsyth County, to some point on the northwestern boundary line of the state, to be hereafter determined."

A glance at the map shows that this railroad MUST run "*near or through*" Wilkes County, *whatever point in the northwestern boundary line of the State is hereafter determined* as the terminus of the railroad. There can be no escape, therefore, from the conclusion that Wilkes County was a county authorized under this ordinance and under Sections 33, 34 and 35 of the Act of 1852 therein referred to and above quoted, to subscribe to the capital stock of this railroad company and to issue

bonds in payment of such subscription. No condition precedent whatever is prescribed by said ordinance and said Act of 1852, except only an election by a majority vote of the qualified voters of the county. If it had been intended in the said ordinance or in the said Act of 1852 to make it a condition precedent to any county "near or through" which said railroad might run subscribing to the capital stock of the railroad company or issuing bonds in payment of such subscription that the line of the road be first definitely located by some subsequent act of the legislature, then it would have been easy to insert some provision to that effect in the ordinance or in the Act of 1852. No such provision was inserted and no such provision can be read into the ordinance or the Act.

There is in said ordinance, it is true, the following language: "to some point in the northwestern boundary line of the State, to be hereafter determined;" but **not even the determination of this point in the northwestern boundary line of the State is made a condition precedent to the subscription of the county to the stock of the railroad company or to the issuance of bonds of the county in payment of such subscription.** The authority to subscribe for such stock and to pay such subscription in bonds of the county, on vote of the qualified voters of the county being had, is conferred in ample terms and without any condition precedent whatsoever. It is true that the county must be one near or through which the railroad may pass, but Wilkes County clearly is such a county.

Furthermore, this was the common understanding and practical construction of this act, for not even the

Act of February 20, 1879, whether it be void or whether it be valid, in whole or in part, nor any other statute, void or valid, undertakes in any way whatsoever to determine the "point in the northwestern boundary line of the state."

The determination of such point in the northwestern boundary line of the State was, therefore, not a condition precedent to the subscription by the county to the capital stock of the railroad company nor to the issuance of bonds in payment of such subscription, and it was not understood to be such condition precedent by anybody who had anything to do with the Ordinance of 1868, or with the Act of February 20, 1879, or with the construction of the railroad, or with the taking of the vote of the qualified electors of the county, or with the issuing of the bonds in payment of the capital stock subscribed by the county. It has, in fact, remained for the learned counsel for the county alone to discover that these words, "to some point in the northwestern boundary line of the state, to be hereafter determined," constitute or contain any such condition precedent, and, with all respect to the learned counsel, he is clearly mistaken in his supposed discovery.

The said Ordinance of March 9, 1868, did not authorize *any* **county** *by name* **to subscribe for stock of a railroad company and issue county bonds in payment therefor. Said ordinance did not name Forsyth County as a county thus authorized to subscribe for stock and to issue bonds, but the Supreme Court of North Carolina in the**

Hill case **and the** *Belo case* **decided that said Ordinance of March 9, 1868, did authorize Forsyth County to subscribe for stock and to issue bonds. On precisely the same reasoning, Wilkes County was by the said Ordinance of March 9, 1868, also authorized to subscribe for stock and to issue bonds. No possible distinction can be drawn between the two countries as respects such authority.**

FORSYTH AND WILKES COUNTIES IN THE SAME CATEGORY.

It is true that said ordinance does name Forsyth County in Sections 1 and 5. In Section 1 the language is (Record, p. 10):

"That for the purpose of constructing a railroad of one or more tracks from some point on the North Carolina Railroad between the Town of Greensboro in Guilford County and the Town of Lexington in Davidson County, running by way of Salem and Winston in Forsyth County to some point in the northwestern boundary line of the state, to be hereafter determined, a company is hereby incorporated," etc.

This, it will be seen, is a mention of Forsyth County merely as a county *by way of which* the railroad will run to some point in the northwestern boundary line of the State. There is no indication in Section 1 of any purpose in said ordinance to authorize Forsyth County to subscribe for stock in said railroad company and to issue bonds therefor any more than to authorize any other county near or through which said railroad may run to make such subscription and to issue such bonds. The railroad by the route here mentioned in Section 1 runs and must run "near or through" Wilkes County just a certainly as it runs

through Forsyth County, and, therefore, so far as the said mention of Forsyth County in said Section 1 is concerned, Wilkes County is in no different category from Forsyth County, and as the Supreme Court of North Carolina is the *Hill case* and *Belo case*, decided that Forsyth County is authorized to subscribe for stock and to issue bonds, so by like reasoning, so far as said Section 1 is concerned, Wilkes County is also authorized to subscribe to stock and to issue bonds.

Forsyth County is mentioned again in Section 5 of said ordinance of March 9, 1868, which provides (Record, p. 11):

"Be it further ordained, That after the organization of said company and the election of the president and other necessary officers, the officers so elected shall proceed, under the advice of the directors, to locate the eastern terminus of the Northwestern North Carolina railroad, and shall proceed to construct said road, with one or more tracks, as speedily as practicable, in sections five miles each, to the towns of Winston and Salem, in Forsyth county, which portion of said railroad, when completed, shall constitute its first division: Provided, that if the distance from the nearest section to the towns of Winston and Salem be less than five miles, the same shall be considered a section."

This Section 5 is a *mandatory* provision upon the said railroad company to "proceed to construct said road with one or more tracks as speedily as practicable in sections of five miles each to the Towns of Winston and Salem, in Forsyth County." So much road the company is by this mandatory provision of the act expressly required to construct "*as speedily as practicable.*" But this provision of Section 5 of said ordinance does not limit the authority of said railroad company to construct a road only to Winston and Salem in Forsyth County, nor is further or additional legislation required in order that said railroad may be

constructed beyond Winston and Salem in Forsyth County.

Said ordinance of March 9, 1868, was ample authority to construct said railroad near or through Wilkes County without any further legislation. Said Section 5 expressly states that the line to Forsyth County is only a "portion" of said railroad, for it says "*which portion of said railroad* when completed shall constitute its first division." The railroad is described in Section 1 of the act and the company is incorporated for the express purpose

"of constructing a railroad of one or more tracks from some point on the North Carolina Railroad, between the town of Greensboro, in Guilford County, and the town of Lexington, in Davidson County, running by way of Salem and Winston in Forsyth County to some point in the northwestern boundary line of the state."

Here in Section 1 is the authority, and the road is expressly incorporated for that very purpose; and further on in Section 1 it is provided that the company

"shall be capable in law and equity of purchasing, holding, leasing and conveying estates, real and personal, and mixed, and acquiring the same by gift or device, so far as may be necessary for the objects herein contemplated and no further," &c., &c.

Section 9 provides for a mortgage to the State "*on the entire road.*"

Section 11 gives the company "the exclusive right of transporting persons and freight *upon said road*" (not upon that portion of the road to Winston and Salem, but upon "said road," that is, the entire road).

Section 12 provides that

"stockholders of said company may pay the stock subscribed by them either in money, labor or material for

constructing *said road*, as the Board of Directors may determine, and that *all counties* or towns subscribing stock to said company shall do so in the same manner," etc.

This section contemplates the construction of said road; that is, the entire road, and contemplates that the counties (not merely Forsyth County, but other counties) may subscribe to stock in said road.

Section 13 provides that

"The company shall have power to construct branches of said road, one of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surry County, to the line of the State of Virginia."

Here then is an express power to construct "*branches* of said road," but if there is no power in the ordinance to construct *the road itself*, that is, the main line of road, as the general route is laid down in Section 1 of the ordinance, with what propriety could power be given to construct "*branches*" of said road? It would be an anomalous thing to hold that there was authority to construct branches of a road, but that there was not authority to construct the road itself.

The words "said road" in Section 13 obviously do not mean merely that portion of the road to the towns of Winston and Salem, in Forsyth County, for when the ordinance speaks of that portion of the road it speaks of it (Section 5) as a "*portion* of said railroad" and (Section 8) "sections of said road, as mentioned in Section 5 of the ordinance," showing that the ordinance when it used the words "said road" meant the *entire road* as the general route is laid down in Section 1 of the said ordinance.

In other words, Forsyth County is not mentioned by name in the said ordinance as a county authorized to

subscribe for stock in said railroad and to issue bonds, but *is mentioned by name only in connection with the route of the railroad;* and as it is demonstrated that the railroad must pass "near or through" Wilkes County, just as certainly as it passes "near or through" Forsyth County, so it is just as certain that Wilkes County was authorized by said ordinance and Act of 1852 to subscribe for stock and to issue bonds as that Forsyth County was so authorized.

The County's Defense Without Merit.

This attempted defense on the part of the county, moreover, that the route of this road as constructed into Wilkes County was one which was not authorized by the said ordinance of 1868, is not only not true in fact, but is a defense utterly unworthy of the people of the county. The purpose of the said ordinance clearly was to authorize the construction of a railroad from the initial point "by way of Salem and Winston, in Forsyth County, to some point in the northwestern boundary line of the state," and, furthermore, to authorize any county "near or through" which said railroad should run, *upon having a vote of the people of the county,* to issue bonds to aid in the construction of such railroad. The people of Wilkes County voted with practical unanimity to issue these bonds. They did it for the purpose of obtaining the railroad and the railroad facilities. The bonds were voted. The railroad company constructed the railroad into Wilkes County, and the county has had the benefit of it ever since. On these facts there is not only no legal merit, but no moral or equitable merit, in the county's attempting to raise any such frivolous defense.

The learned counsel for the county also mentions the fact that the ordinance of March 9, 1868, in Section 12 thereof, refers to the act incorporating the North Carolina and Atlantic Railroad Company, whereas the name of that Company should be the Atlantic and North Carolina Railroad. This was obviously a mere clerical error. The company and the act intended were certain, as was held by the Supreme Court of North Carolina in the said *Belo case*, 76 N. C., 489, where the Court expressly refers to Section 34 of the said act of 1852, which is printed in the record in this case, and mentions the same as being a part of the act referred to in the said Section 12 of the ordinance of March 9, 1868. This decision was rendered long before the bonds in question in the present case were issued, and is conclusive in the matter as respects the present bonds.

The learned counsel for the county also argues that the framers of the Constitution of 1868 clearly intended to safeguard the interests of the counties by having the attention of legislators called sharply to any proposition to levy a tax upon counties represented by them. We would go even further and say that the framers of the Constitution in 1868 clearly intended to safeguard the interests of the counties by requiring that the voters of the county should vote upon any proposition to levy a tax or incur a debt, except for necessary expenses. This was the means by which any undue taxation or undue incurring of debt was to be checked and regulated. The people of the county voted almost unanimously in favor of the issue of the bonds in the present case, and any attempt now by the

learned counsel to argue that any great public policy announced in the Constitution of 1868 has been disregarded is utterly without foundation.

Galloway case wholly inapplicable.

The learned counsel for the appellants cites the case of *Galloway vs. Chatham Railroad Company*, 63 N. C., 147 (1869). That case arose under Article V., Section 4, of the Constitution of North Carolina not in any way involved in the present case), which is as follows :

" SECTION 4. Until the bonds of the State shall be at par, the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State, except to supply a casual deficit, or for suppressing invasion or insurrection, unless it shall in the same bill levy a special tax to pay the interest annually. And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association or corporation, except to aid in the completion of such railroads as may be *unfinished at the time of the adoption of this Constitution*, or in which the State has *a direct pecuniary* interest, unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon."

* * * * * *

This section refers wholly to bonds issued by the *State*, and not at all to bonds issued by the counties, and its provisions are different from any provisions, either constitutional or statutory, relating to bonds issued by counties. The Court in that case held (p. 158),

" that the road provided for in the act of 18th December, 1868, is neither an unfinished road nor one in which the *State* had, at the adoption of the constitution [April 24, 1868], a direct pecuniary interest."

No such question arises under the constitutional provisions or legislation applicable to the Wilkes County bonds.

The question in the case of *Galloway vs. Chatham Railroad Company*, 63 N. C., 147, was whether, under Article V., Section 5 (now Section 4), of the constitution, the general assembly of North Carolina had the power to pass the act of December 18, 1868, eight months after the adoption of the constitution (April 24, 1868), authorizing **a new line of railroad,** and providing for the issue of **state railroad aid bonds, without submitting the question to a vote of the people of the State.** PEARSON, C. J., states the question involved and decided in the case as follows:

(p. 151): "Under Article V., Section 5, a question is made 'Has the General Assembly power to create this debt of two millions in aid of the Chatham Railroad Company unless the subject be submitted to a direct vote of the people?'"

The Constitution, Article V., Section 4, provided that no such State bonds could be issued

"except to aid in the completion of such railroads as may be *unfinished at the time of the adoption of this constitution*, or in which the State has a *direct pecuniary* interest, unless the subject be submitted to a direct vote of the people of the State and be approved by a majority of those who shall vote thereon."

The precise question, therefore, in this *Galloway case* was whether the road in question, first authorized December 18, 1868, eight months after the constitution was adopted, was an "*unfinished*" road "*at the time of the adoption of the constitution*" within the meaning of the said Section 4, and the Court held, of course, it was not.

No such question arises in the present case. The provisions of the Constitution above quoted, which were involved in the *Galloway case*, have absolutely no application to or connection with the present case.

The Supreme Court of the State of North Carolina distinctly declared in said *Hill* and *Belo cases* that the said ordinance of 1868 incorporating the Northwestern North Carolina Railroad Company was *per se* and without any legislative act sufficient authority for Forsyth county to subscribe to the capital stock of the Railroad Company and issue county bonds in payment therefor. The Court distinctly puts its decision upon the ground that the "bonds were valid in the hands of *bona fide* holders without the aid of this healing act;" that is, under the ordinance of 1868, and without the aid of the act of August 11th, 1868. This is not any mere dictum of the Court, but is the ground on which the Court expressly rested its decision. Mr. Justice HARLAN in this very case (180 U. S., p. 529) has expressly so stated. It is true that the North Carolina Supreme Court also rested its decision upon the further ground that, "if any defects existed in the bonds," "the ratifying act of August 11, 1868, was a curative act and validated both the county subscription and the issue of the bonds." The court put its decision on both grounds, and not on either ground to the exclusion of the other. The language of the court as respects both of these grounds, therefore, amounts to a decision, and its language on either ground is not a mere dictum.

Furthermore, This Decision in the Hill Case Made in 1870, and This Decision in the Belo Case Made in 1877, Construing This Ordinance of the Constitutional Convention of 1868, was a Construction Upon Which the Purchasers of the Bonds in Question in the Present Case Had a Right to Rely.

When the bonds in the present case were issued in 1889 these two decisions above quoted stood unreversed and unquestioned in the officially printed reports of the Supreme Court of North Carolina, construing the said ordinance. At the time of the issue of these bonds there was not a word or syllable in the said reports contrary to the said decisions. The said ordinance of the Constitutional Convention has not been in anywise changed either by constitution or by statute, from what it was when the above-quoted opinions of the Supreme Court of North Carolina to the two Forsyth county cases, were rendered.

The provisions of the Constitution of the State of North Carolina, mentioned in the said first question, certified to this Court by the Circuit Court of Appeals —namely, Article II., sections 14 and 16, and Article V., sections 1, 4, 6 and 7, and Article VII., section 7— were precisely the same at the date of the rendering of the decisions in the two *Forsyth county cases* above cited as they were when the bonds in question in the present case were issued.

As stated above, the same ordinance of the Constitutional Convention of 1868 had not been repealed, nor had the Legislature attempted to repeal it. Certain

additional acts had been passed; but if on this branch of the argument it be conceded, merely for the sake of the argument, that all of those acts had fallen, because not properly enacted, nevertheless the said ordinance of the Constitutional Convention of 1868 stood when these bonds were issued, and stands to-day, precisely, the same as it stood when the bonds were issued which were in question in the two Forsyth county cases of *Hill* and *Belo* above quoted.

This present case, therefore, is brought directly within the principles announced by the Supreme Court of the United States in numerous cases in which this Court has held that when a contract, and especially one which is evidenced by commercial paper, was valid under the Constitution and statutes of a state, as then construed by the State Court, it will be held valid by the Supreme Court nothwithstanding the fact that after such contract was made the State Court may, as in the case now at bar, have changed its decisions.

This proposition was certified to the Circuit Court of Appeals in Answer No. 2 by the Supreme Court of the United States (Record, p. 110; 180 U. S., 533).

Recital of the Act of February 20, 1879, in the bonds is immaterial.

It is immaterial that the bonds in question in the present case (Record, p. 16) recited that they were issued by authority of the act of February 20th, 1879, which was an attempted amendment of the Convention ordinance of 1868, and did not recite that they were issued under the ordinance itself, for it is well-settled law that if there was, in fact, legislative or legal authority for the issue of bonds, it is immaterial that the bonds recite another legislative act which did not give such authority.

This express proposition was considered and decided by this Court when this case was here before on certified questions from the United States Circuit Court of Appeals, and we might content ourselves with merely referring to what this Court then decided (see *Wilkes County vs. Coler*, 180 U. S., 506, 524). We may, however, state briefly the principle on which this proposition rests.

It was not necessary that the bonds in question should recite the Act of February 20, 1879, at all, nor was it necessary that they should recite any act under which they were issued. Any recital of this Act of February 20, 1879, therefore, being useless, could be rejected as surplusage without vitiating the necessary and substantial parts of the bonds. This is under the familiar rule of law expressed in the legal maxim, "*Utile per inutile non vitiatur.*"

A decision of this Court exactly in point is *Anderson County Commissioner vs. Beal.* 113 U. S., 227 (1885). In that case Mr. Justice BLATCHFORD, giving the opinion of this Court, says (p. 236) :

" It is not disputed that the recital in the bond that it was issued under the act of February 26th, 1866, Sess. Laws of Kansas, 1866, ch. 24, page 72, was an error * * * (p. 237). It is very clear that there was legislative authority under the act of 1869 for the issuing of the bonds in question. There was an election, and the requisite majority of those who voted assented to the proposition for the subscription to the stock and the issue of the bonds, and the subscription was made by the proper officers, and they issued the bonds." etc. * * * (p. 238). " The bond recites the wrong act, but if that part of the recital be rejected there remains the statement that the bond ' is executed and issued ' ' in pursuance to the vote of the electors of Anderson County of September 13th, 1869.' The act of 1869 provides that when the assent of a majority of those voting at the election is given to the subscription to the stock the county commissioners shall make the subscription and shall pay for it, and for the stock thereby agreed to be taken, by issuing to the company the bonds of the county."

This Court, therefore, held the bonds valid, notwithstanding they recited the wrong act.

In Dillon on "Municipal Corporation," Fourth Edition, Section 523, note, it is stated :

" That bonds recite as authority for the issue a wrong act of the legislature does not necessarily invalidate them, if it can be shown that they were in fact issued under an act conferring the power " (citing *Anderson County Commissionere vs. Beal, supra,* and other cases).

See, also, to the same effect :

Knox County vs. Ninth National Bank, 147 U. S., 91.

Cairo vs. Zane, 149 U. S., 122.

Furthermore, even if the rule were not as laid down in *Anderson vs. Beal, supra*, these bonds recite that they are issued by authority of an act of the General Assembly of North Carolina, ratified the 20th day of February, 1879, entitled "An Act to amend the charter of the Northwestern North Carolina Railroad," etc. The holder of these bonds is therefore notified of this act, but **on examining this act he will further see that this act is an amendment "of the ordinance of the convention of one thousand eight hundred and sixty-eight, ratified the ninth day of March, one thousand eight hundred and sixty-eight."** As said ordinance gave authority for the issue of these bonds, and as the holder of the bonds is thus, by reference to the Act of February 20, 1879, referred to the said ordinance of March 9, 1868, which the said Act of February 20, 1879, amends, there is no reason why a bondholder may not examine and refer to the said ordinance as authority for the issuance of the bonds in question.

In the case of *Anderson vs. Beal, supra*, the Supreme Court of the United States held that even if the bond recited a wrong act, it was competent to rely upon another act which really did give authority, although such other act was not recited. Much more is it competent in the present case, to refer to this ordinance of March 9, 1868, as the bondholder did, by reference as above stated, have notice of the said ordinance by the recital in the bond and by an examination of the Act of February 20, 1879, there recited.

See, also, *Evansville vs. Dennett*, 161 U. S., 434, in which case a bond issued by the City of Evansville, in aid of the Evansville, Carmi and Paducah Railroad Com-

pany recites (page 436) "the original City charter of Evansville, approved January 27, 1847, and an act amendatory thereof, approved March 11, 1867," and in which case this Court held that the recital of the invalid amendatory act did not vitiate the bonds, but that they were good under the original act. So, also, this Wilkes County bond (Record, page 16), in reciting the title of the amendatory act of February 20, 1879, recites "The Charter of the Northwestern North Carolina Railroad," that is, the ordinance of March 9, 1868; and of course as the said ordinance gives full authority to issue these bonds, the recital of the amendatory act of February 20, 1879, does not vitiate the bonds.

The learned Judge who gave the majority opinion in the case of *Commissioners of Wilkes County vs. Call*, 123 N. C., 308, 1898, cited the case of *Gilson vs. Dayton*, 123 U. S., 59, as holding that the recital of a wrong act is fatal to the validity of bonds. This case does not hold any such thing. On the contrary, the whole case is stated in the opinion United States Supreme Court, given by Mr. Chief-Justice WAITE, the opinion being in full as follows—to wit (p. 61):

"The judgment in this case is affirmed on the authority of *Crowe vs. Oxford*, 119 U. S., 215. See, also, *Post vs. Supervisors*, 105 U. S., 667, 691. It appears on the face of the bonds sued for that the subscription was made under and by virtue of the act of February 18, 1857, and that the vote of the town was taken at a special town meeting called upon the 'application in writing of fifty legal voters of said town,' which is in accordance with the provisions of that act. The act of March 6, 1867, which the plaintiff now claims is sufficient to support the bonds, requires that the application for the town meeting shall be made by 'twenty voters and *tax-payers*.' The record does not show that any of those who signed the application for the meeting at which the vote was taken were taxpay-

ers. It thus appears from the bonds themselves not only that they were issued under the act of 1857, but that they were not issued under that of 1867."

It thus appears that in the case of *Gilson vs. Dayton* the act which might, in fact, have given authority was not followed, as there was not any application of *taxpayers ;* and, of course, the bonds in that case were held invalid.

The late decision, 1898, by the State Supreme Court *(Call Case,* 123 N. C., 308) **overruling the Hill and Belo cases is intrinsically unsound and proceeds upon mistaken data.**

The Supreme Court of North Carolina, in the case of *Commissioners of Wilkes County vs. Call,* 123 N. C., 308, decided in 1898, by a bare majority, long after these Wilkes County bonds were issued, has undertaken to hold for the *first time* that the said ordinance of March 9, 1868, adopted by the Constitutional Convention of 1868, did not confer any power upon Wilkes County to subscribe for the stock of the railroad company and issue these bonds. In attempting to do this the Court has undertaken to overrule the decisions in the *Hill case* and the *Belo case,* concerning the Forsyth County bonds, decided in 1870 and 1877 respectively, and above quoted. The Court, in the *Call case,* by a bare majority, said that these two cases were distinguishable, but it gave no real reason for any distinction. In some respects the statements

of the Court in *Commissioners vs. Call* are obviously incorrect; for example, the Court says (p. 318):

"Another important point of difference is that the Forsyth county bonds were voted and subscribed within a few months after the passage of the ordinance, before whatever power it may have given, if any, had expired by its own limitation."

It is impossible to conceive what the Court meant by the ordinance of 1868 expiring "by its own limitation." There is no limitation in the ordinance which makes it expire. The *Hill and Belo cases*, above quoted, do, as we have already seen, expressly decide that the ordinance gave power to issue the bonds there in question.

Again, the Supreme Court of North Carolina, in the *Call case*, says:

(p. 321): "The ratification of the constitution on the 24th day of April, 1868, when it went into effect for all domestic purposes, annulled all special powers remaining unexecuted and not granted in strict accordance with its requirements. Article II., Section 14, is as follows: 'No law shall be passed to raise money on the credit of the State or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each House of the General Assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each House respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the Journal.' Article VII., Section 7, is as follows: 'No county, city, town or municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of a majority of the qualified voters therein.'"

This proposition of the Court, and the sections of the Constitution cited by it, do not at all affect the question of the continued existence of the said ordinance of the Constitutional Convention incorporating the Northwestern North Carolina Railroad Company, ratified March 9th, 1868. Article II., Section 14, of the Constitution, quoted by the Court, is as follows: "No law shall be passed," etc. [Text of said Section 14, see Appendix to this Brief]. This, by its very terms, and under all the authorities, is a direction to the Legislature. "No law *shall* be passed," etc., obviously means shall *hereafter* be passed. This Section 14 occurs in Article II., which is devoted to directions to the Legislative Body, and it prescribes a rule of procedure for the future enactment of laws *by the Legislature.* It does not either expressly or impliedly repeal or annul any existing laws of the State. As stated in *County of Scotland vs. Thomas*, quoted below: "It does not purport to take away any authority already granted. It only limits the power of the legislature in granting such authority for the time to come."

This precise question was before the Court in *County of Scotland vs. Thomas*, 94 U. S., 682. The decision of the Court on that point is stated as follows (p. 688):

"The clause of the Constitution on which the defendant relies is the fourteenth section of art II., and is as follows: 'The general assembly shall not authorize any county, city, or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto.' **This prohibition, it will be observed, is against the legislature's authorizing municipal subscriptions or aid to private corpo-**

rations. It does not purport to take away any authority already granted. It only limits the power of the legislature in granting such authority for the time to come."

See, also, to the same effect:

County of Callaway vs. Foster, 93 U. S., 567.
County of Henry vs. Nicolay, 95 U. S., 619.
Louisiana vs. Taylor, 150 U. S., 454.
Macon County vs. Shores, 97 U. S., 272.
Howard County vs. Paddock, 110 U. S., 384.

See, also, other cases cited in "Dillon on Municipal Corporations," Fourth Edition, Section 542, note.

The principle of these decisions is further recognized by the Supreme Court of the United States in *Norton vs. Brownsville*, 129 U. S., 479, where that Court, Mr. Chief-Justice FULLER giving the opinion, after citing certain other cases which arose under provisions of a constitution which directly prohibited counties, cities, etc., from issuing railroad aid bonds, says (p. 490):

"These cases sufficiently illustrate the distinction between the operation of a *constitutional limitation upon the power of the legislature*, and of a constitutional inhibition upon the municipality itself. *In the former case past legislative action is not necessarily affected*, while in the latter it is annulled."

Article VII., Section 7, of the Constitution of North Carolina, is a "constitutional inhibition upon the municipality itself," but it only inhibits the issue of railroad aid bonds by a municipality "unless by a vote of a majority of the qualified voters therein." There was a vote of a majority of the qualified voters in the case of these Wilkes county bonds, and, therefore, this "constitutional inhibition upon the municipality itself" was not violated by the issue of said bonds.

Ordinance of March 9, 1868, not repealed by the Constitution or any legislative act and was as to the power to issue bonds in full force in 1889 when the bonds in suit were issued.

Not only was this proposition decided by the *Hill case* and the *Belo case*, but, as the Court held, in this case (180 U. S., p. 529), this decision in the *Hill* and *Belo* cases was correct, as we proceed to show.

Article II., Section 14, of the Constitution, does not either expressly or impliedly require the re-enactment of existing legislation, even statutory legislation, much less ordinance legislation enacted by the Convention that framed the Constitution. Not only so, but another part of the Constitution, Article IV., Section 19, expressly provides :

"The laws of North Carolina, not repugnant to this constitution, or the constitution and laws of the United States, shall be in force until lawfully altered."

Also Article VII., Section 12, provides :

"All charters, ordinances and provisions relating to municipal corporations shall remain in force until legally changed unless inconsistent with the provisions of this constitution."

There are no other repealing provisions in the Constitution of 1868. No attempt is made in the Constitution of 1868 to repeal the said ordinance of March 9, 1868, nor is there anything in said ordinance inconsistent with the constitution.

That a "county" is a "municipal corporation" within this Section 12 appears from the language of Section 7 of the same Article VII., which speaks of "county, city, town or other municipal corporation."

This Article II., Section 14, does not provide any method of passage of laws *theretofore* enacted, and has no application to any laws previously passed.

Article VII., Section 7, however, does operate directly upon the county or other municipal corporation, and it does provide that such a county "shall not contract any debt," etc., "except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein." [Text of said Section 7, see Appendix to this Brief.] This section, however, does not expressly or impliedly repeal even any previously-existing statute. Much less does it repeal this ordinance of the constitutional convention. What this section does do is to operate directly upon the municipality and to provide that the municipality "shall not contract any debt," etc., "unless by a vote of a majority of the qualified voters therein." Such a vote was had in the present case, and this section of the constitution therefore, did not prohibit the issue of these bonds of Wilkes County.

Applying this language of Article VII., Section 7 of the constitution to the said ordinance of the constitutional convention, it is obvious that even if this ordinance were in the nature of a statute only, the ordinance would not be repealed, because the said ordinance, by referring to the Act of 1852, Sections 33–37, above quoted, expressly provides for the holding of an election by the qualified voters of the county to vote upon the question of the issue of the bonds. The said ordinance, therefore, is not inconsistent with the said Article VII., Section 7, of the constitution, and

was not repealed by it. We have already seen that the said ordinance was not repealed by Article II., Section 14, of the constitution.

Furthermore, the said Article II, Section 14, has no application to the said ordinance. The said ordinance is not a statute, and is, therefore, not within Article II., Section 14. This Section 14, is addressed to the legislature, and the words "no law shall be passed," etc., in this said Section 14 mean no law enacted by the legislature. The said ordinance was enacted by the constitutional covention, and the language of Article II., Section 14, is wholly inapplicable. For example, there were not two houses in the constitutional convention, and, therefore, the ordinance could not have been agreed to by *each house respectively*, etc., etc.

The Supreme Court of North Carolina, then, committed an obvious and plain error, in the *Call case* in holding, or attempting to hold, that either Article II., Section 14, or Article VII., Section 7, repealed, or undertook to repeal, the said ordinance adopted by the constitutional convention.

Moreover the said ordinance and Sections 33 to 37 of the Act of 1852, made part of it, fully comply with Section 6 and 7 of Article V. of the Constitution, as fully appears from the "special" character of said ordinance—even if said Sections 6 and 7 can apply to said ordinance.

The true nature and effect of the said ordinance in-

corporating the Northwestern North Carolina Railroad Company appears not to have been considered by the Supreme Court of North Carolina in the said *Call case*.

This is, perhaps, not surprising, as there was no brief and no counsel before the court in that case to present anything in opposition to the claim of the county commissioners that these bonds were invalid.

There is neither an EXPRESS nor IMPLIED REPEAL of the Ordinance of March 9, 1868, and the said Ordinance was in full force when the bonds in suit were issued, and the same were issued in full conformity with its provisions and with the provisions of the Constitution.

When this case was argued before it was strongly insisted by the counsel for the county that the Ordinance of March 9, 1868, did not survive the adoption of the Constitution of North Carolina in April, 1868. This point was fully argued, and this Court expressly held that the Supreme Court of North Carolina in the *Hill* and *Belo cases* had decided the point that the Ordinance did survive the adoption of the Constitution and was unaffected by it, and that point is, we conceive, no longer open for argument in this Court. But if this point shall be re-argued by the counsel for the county, we now proceed to show that this Court rightly decided that the point had been previously adjudged in the same way by the Supreme Court of North Carolina in the *Hill* and *Belo cases*.

There being no *express* repeal by the constitution of the ordinance of March 9, 1868 (which ordinance by

reference includes Sections 33, 34, 35, 36 and 37 of the charter of the North Carolina and Atlantic Railroad Company, being chapter 136 of the laws of North Carolina, 1852), at the very utmost the constitution would affect the said ordinance only so far as it was plainly inconsistent with it; that is to say, it would be a *repeal*, if at all, *by implication*. On the contrary, there being no conflict between the ordinance and the constitution, relating to the power to issue these bonds, the constitution itself, in express terms, recognizes and continues the ordinance in force, even if it be treated as an ordinary enactment, since Section 19, Article IV., of the constitution provides as follows:

"SECTION 19. The laws of North Carolina, not repugnant to this constitution or the constitution and laws of the United States, shall be in force until lawfully altered."

Now, if you lay the constitution adopted April 24, 1868, alongside the ordinance of March 9, 1868, no repeal or annulment of the power of counties, mentioned in the ordinance of March 9, 1868, to take stock or issue bonds will be found. On the contrary, the scheme of the constitution and the scheme of the ordinance are the same. The ordinance authorizes counties on or near the line of the chartered railroad to subscribe for stock on a vote of a majority of the qualified voters of the county. The constitution, Article VII., Section 7, authorizes counties to become subscribers to the stock of railroad companies on "a vote of the majority of the qualified voters therein;" that is to say, both under the ordinance and constitution counties may be authorized to subscribe stock when sanctioned by a majority of the qualified voters of the county, and such a majority did sanction the

issue of the bonds of Wilkes county in the present case.

It is alleged in the complaint (paragraph 22, Record, p. 7) as follows:

"That the county of Wilkes, acting through its board of commissioners, and in accordance with the ordinance and acts, as above set out, subscribed the sum of one hundred thousand dollars to the capital stock of the North Western North Carolina Railroad Company, the proposition to subscribe the said amount having *been submitted to the qualified voters of the county at an election held according to law, and a large majority of the said qualified voters having voted in favor of the same.*"

This is admitted in the answer (paragraph 22, Record, p. 27) as follows:

"These respondents, still denying the authority of the former commissioners to issue bonds or subscribe to the capital stock of the said company, admit that they did subscribe and issue bonds in the amounts alleged in the complaint, and that *it was ascertained and declared that a majority of the qualified voters of Wilkes county had voted in favor of making such subscription, and that it is now too late to question said finding as to said vote.*"

Moreover, the bond recites (Record, p. 16) that the said issue of bonds now in question was

"authorized by *a vote of a majority of the qualified voters of Wilkes county*, by an election regularly held for that purpose on the 6th day of November, A. D. 1888, and by an order of the board of commissioners of Wilkes county, made on the first day of April, A. D. 1889."

That this recital creates an estoppel as to the vote, even though the ordinance of 1868 is not recited in the bond as the authority for the issuance of the bonds, see *Anderson County vs. Beal*, 113 U. S., 227, quoted, *supra*, on this brief (see *ante*, p.).

So that in the present issue of bonds by Wilkes county there is no provision either of the ordinance of March 9, 1868, or of the constitution of the state which was adopted April 24, 1868, repealing, annulling, or in any way impairing or affecting the power of Wilkes county to issue the bonds in question.

As elsewhere pointed out in this brief (*ante*, p. 53) Section 14 of Article II. has no application, because that refers in the language "No law shall be passed," etc., to laws which shall be hereafter passed, and also refers only to laws to be passed by the General Assembly since it prescribes the method and manner of their passage by readings on three different days, and taking the ayes and the noes on the second and third readings in *each house*, and entering the same on the journal, &c., &c. These requirements in their terms and nature can have no reference or application to the ordinance of 1868, passed by the Constitutional Convention, which was *only one house* (see *ante*, p. 57).

If the question is still open to the county to argue that the ordinance of March 9, 1868, did not survive the adoption of the constitution in April, 1868, the conclusion that the ordinance did so survive is further shown to be correct by the considerations which we now proceed to present.

Ordinance of Constitutional Convention passed March 9, 1868, not inconsistent with Constitution. Section 7, Article VII. of Constitution may be read as amending said Ordinance and Act of 1852, if necessary.

The said ordinance of March 9, 1868, was of the same dignity as the constitution, and was operative *per se* by its own force, and it could be maintained, if necessary, that no provision of the Constitution of 1868 would operate to modify or repeal the said ordinance if there was any conflict between the two. But it is not necessary in the present case to maintain that proposition, for the constitution is not in anywise inconsistent with the said ordinance. Article VII., Section 7, of the constitution, which provides, in substance, that a county shall not contract any debt, etc., except for the necessary expenses thereof, unless by a vote of a majority of the qualified voters therein, might apply to, and operate directly upon, any county in the State, and thus, if necessary, be written in as an amendment to the said ordinance of March 9, 1868.

This point has been determined by the Supreme Court of North Carolina in the case of *Wood vs. Oxford*, 97 N. C., 227 (February Term, 1887) and *Rigsbee vs. Durham*, 99 N. C., 341 (February Term, 1888).

In *Rigsbee vs. Durham (supra)*, the Supreme Court of North Carolina says (page 347):

"That statute plainly declares the purpose and makes large provision, much in detail, for carrying it into practical effect. It provides that *if a majority of the votes cast* at such election shall be in favor of such tax, it shall be levied. It may be conceded for the present purpose that such a vote could not authorize the levy of such tax, but when, under the statute con-

taining this provision, a majority of *all the qualified voters of* the town vote in favor of it, such vote is sufficient to give the authority. When the legislature declares that a majority of the votes cast at the election shall give the authority, this certainly, in the nature of the matter, includes and implies its willingness and purpose, for the same and like considerations, to give it, if a majority of all the qualified voters of the town shall vote in favor of it. The nature of the statute—its purpose and provisions—all clearly indicate such intent, and we can see nothing in the constitution or sound public policy that forbids or prevents it. The chief and leading purpose is to give the authority to levy the tax if at least a majority of the votes cast shall be in favor of it, and the constitution (Art. VII., Sec. 7) declares that 'a vote of the majority of the qualified voters' of the town shall be necessary to give it. If the statute had omitted, as it might have done, to prescribe the necessary vote, the constitution would have determined it. This interpretation harmonizes the statute with the constitution, and gives effect to the legislative intent. *Wood v. Oxford*, 97 N. C., 227."

In *Wood vs. Oxford (supra)* the Supreme Court of North Carolina says (page 233):

"Now, it is clearly one of the declared purposes of the statute (Acts 1885, ch. 115) to authorize certain incorporated towns to make 'donations' in the way prescribed, to the railroad company, the defendant the Oxford and Clarksville Railroad Company, organized under and in pursuance of its provisions. And it plainly requires a proposition to make such a donation to be submitted to the 'qualified voters' of the town which it was proposed should make the same. It may be that the statute contemplates that if a simple majority of 'the qualified voters' *voting*, shall be in favor of such donation, this shall be sufficient to authorize it to be made. This is questionable, but we need not decide whether it so provides or not, because the purpose to allow such donations to be made is manifest, and it appears in the case before us that a clear majority of all the qualified voters of the town of Oxford voted in favor of the proposed donation of forty thousand dollars in question, thus certainly meeting the essential prerequisites provided by the statute and ob-

serving the provision of the Constitution (Art. VII., Sec. 7) forbidding towns and other municipal corporations to make a debt, except, &c., 'unless by a vote of a majority of the qualified voters therein,' and likewise observing the requirements of the charter of that town (Acts 1885, Pr. Acts, ch. 21, Sec. 30). As the purpose of the Legislature to allow such donations to be be made is clear and express, it is sufficient, if the condition upon which it might be made has certainly, in the most adverse view of the proposition as to the vote, happened.

"Unquestionably, the Constitution allows a county, city or town to contract, pledge its faith, or loan its credit, for a proper purpose, if authorized to do so by the Legislature, when and if a majority of the qualified voters therein shall vote in favor of the same.

In this case, the purpose, as we have seen, was lawful—the Legislature authorized the donation to be made, and a debt to that end to be contracted, and a majority of all the qualified voters in the town of Oxford voted in favor of the donation, and thus in favor of the debt to be made. Thus the statute and the Constitution allow and sanction it, and it must be upheld as valid and lawful."

The fact as to "a vote of a majority of the qualified electors" (the very words used by the Constitution, Art. VII., Sec. 7) is conclusively established by the recitals in the bonds ("a vote of a majority of the qualified voters of Wilkes County") and by the allegations of the complaint and answer quoted at length in this brief, page 16.

That in such a case such a provision of the constitution operates to amend an existing charter passed by an act of the legislature is expressly held in the case of *East St. Louis vs. Amy*, 120 U. S., 600, and also in the case of *East St. Louis vs. People*, 124 Ill., 655.

In the case of *East St. Louis vs. Amy, supra*, the facts were as follows: In 1869 the legislature of Illinois had passed an act granting the city of East St.

Louis power to issue $100,000 of bonds and to levy a tax of three mills for the payment thereof. In 1870 the new constitution of Illinois went into effect, which, in substance required that a municipal corporation issuing any bonds should, at or before the time of doing so, provide for the levy and collection of a sufficient tax to pay the interest on such bonds, and to pay the principal within twenty years. This Court held that this provision of the constitution of Illinois of 1870 *did not repeal the said authority granted by the said act of 1869*, but that it amended it, and that *this amendment was, in effect, written into the charter*, so that the $100,000 of bonds were still authorized to be issued; but that, instead of the three mill tax levy provided in the charter for the payment thereof, a tax levy sufficient for the full payment of the interest and principal could be levied, as required by the constitution.

The Supreme Court of Illinois, in the case of *East St. Louis vs. People*, *supra*, decided the same question the same way, and cited with approval the opinion of the Court in *East St. Louis vs. Amy*, *supra*.

See, also, to the same effect the case of *Neal vs. Delaware*, 103 U. S., 370, cited by this Court in *East St. Louis vs. Amy*, 120 U. S., 600, 603, *supra*, in which case it was held that the Fifteenth Amendment to the Constitution of the United States of itself, and without any action by the State, was written into the election law and into the jury law of the State of Delaware as an amendment thereof, and that *no new legislation* for this purpose was required by the State of Delaware, but that these election laws and the jury laws stood, and were in force, as thus amended by the Fifteenth Amendment to the Constitution of the United States.

The Vote Required by the Constitution of North Carolina, Art. VII., Sec. 7, Was Had for the Bonds Now in Question.

A vote of the people of the County was required also by the said Ordinance of March 9, 1868, and sections 33–37 of said Act of 1852, referred to in Section 12 of said ordinance. The vote which was had satisfied both said Article VII., Section 7 of the Constitution and the said ordinance and said Act of 1852.

The learned counsel for the county has at times repeated the error of Justice FURCHES, that in the *Hill* and *Belo cases* the subscription was made and the bonds were issued *before* the adoption of the Constitution of 1868. It is difficult to understand why the learned counsel has repeated this obvious error and based any argument thereon. The facts are stated and the dates specifically given by the Supreme Court of North Carolina in the *Hill case*, 67 N. C., 367, and again in the *Belo case*, 76 N. C., 489. It clearly and unquestionably appears there that the subscription was not made until the *June Term, 1868, after* the constitution adopted April 24, 1868, went into effect; and the bonds were not issued until after August 11, 1868, for they recite an act of that date.

The learned counsel for the county apparently takes the unsound and amazing position that in the *Hill case* and *Belo case* the Supreme Court of North Carolina made a "*grave mistake as to the very essence and nature of the authority relied on*," and that it is the duty of this Court now to correct the mistake made by the

Supreme Court of North Carolina in these cases. The fact is, the Supreme Court of North Carolina, in the *Hill* and *Belo cases*, made no mistake, but correctly construed the said ordinance of March 9, 1868, as giving, *per se*, authority to issue bonds precisely like the bonds now in question; but, even if the Supreme Court had made a mistake in the *Belo case*, that case would, under familiar principles, be conclusive in favor of the holders of the present bonds, since that case was decided long before the present bonds were issued, and at the time of their issuance there was not any decision against their validity, nor any decision in any way modifying or overruling the said *Hill* and *Belo cases*.

The Supreme Court of North Carolina, in the Recent Case of Commissioners of Wilkes County vs. Call, is Clearly in Error in Its Consideration and Statements of the Hill and Belo Cases.

The Supreme Court of North Carolina, in *Commissioners vs. Call* (123 N. C., 308, p. 317), 1898, undertakes to distinguish the case of *Belo vs. Commissioners* (76 N. C., 289), by saying as follows:

"We have not overlooked the fact that in *Belo vs. Commissioners*, 76 N. C., 488, this court strongly intimates that Section 12 of the charter did confer the authority given in Section 33 of the act of 1852" [Section 2 of the ordinance of the constitutional convention gave the power, and Section 12 prescribed the manner of its exercise], "but it does so incidentally and with little discussion, because it was not denied in the pleadings. This was not the determining point in the case, which turned chiefly upon the recitals in the bonds and the ratifying act of 1868. This is clearly shown in the opinion itself, which devotes four pages

to the discussion of equitable estoppel arising on the recitals, and about half a page to the possible binding effect of the ordinance, winding up with the significant sentence, on page 497, that ' as the case is presented to us, that question does not arise, and we do not decide it.' It evidently did not receive careful investigation, as it apparently did not arise on the pleadings. The court stated that the ' principle of equitable estoppel is a most important element in the transaction,' and that the recitals in the bonds (which are essentially different from those now before us) constituted an estoppel in *pais* upon the county of Forsyth."

It cannot be possible that it is necessary to remind this Court that there cannot be any estoppel by recitals where there was absolutely no legislative authority for the issue of bonds. The whole discussion of the Supreme Court of North Carolina in *Belo vs. Commissioners*, which, as stated by the Court in the case of *Commissioners us. Call*, occupied four pages, proceeded upon the only possible ground—namely, *that there was legislative authority* in the said Ordinance of 1868, but that perhaps that authority had not been strictly followed. The question which the Court, on page 497, says " does not arise " is not what the Supreme Court of North Carolina, in the *Call case*, apparently means to give the impression that it is, but it is this question, stated in the very words of the opinion of the Court in *Belo vs. Commissioners*, to wit:

" When the subscription was voted there is authority and reason for asserting that the Justices could have been compelled by process of law to make the subscription, unless in defense they could have shown that the election was not fairly conducted but was influenced by the fraud of the Railroad Company (*People v. Supervisors*, 27 Cal., 655). As the case is presented to us, that question does not arise and we do not decide it."

On the question of whether there was power to issue the bonds, the Court said, distinctly, in *Belo vs. Commissioners :*

" The county was clothed with the power to issue them, and it is admitted that a majority vote sanctioned the subscription of stock and the issue of the bonds."

Again, the Court said :

" It has been one purpose of this opinion to show that the bonds were valid in the hands of bona fide holders without the aid of this healing act" [that is, the act of August 11, 1868], the only other authority being the said ordinance.

In connection with this case of *Commissioners of Wilkes Co. vs. Call* (123 N. C., 308, 1898), we desire to call the attention of this Court to what is obviously an error in the statement of facts in the dissenting opinion of Justice FURCHES. He says (p. 328) :

" On the 25th of March, 1868, the county of Forsyth subscribed $100,000 to said corporation [Northwestern North Carolina Railroad Company], which subscription was held to be valid in *Hill vs. Commissioners*" (67 N. C., 367).

The date, March 25, 1868, is obviously an error. This error has been quoted and repeated from time to time by the learned counsel in the present case. It appears from the statements of fact made by the Supreme Court of North Carolina, in the case of *Hill vs. Commissioners*, not that the bonds of Forsyth County were issued on March 25, 1868, but that on March 25, 1868, the justices made an order to submit the question of subscription to the qualified voters of the county, the vote to be taken on April 4, 1868. It also

appears that the returns of the election were made to the June Term, 1868, of the County Court and that the said court, at the June Term, ordered the subscription to be made. It further appears from the official report of the case of *Belo vs. Commissioners of Forsyth County*, that, of the said bonds, some, at least, were not sold until March 5, 1869, and that these bonds recited that they were "authorized by an ordinance of 1868, by an order of the Court of Pleas and Quarter Sessions of Forsyth County, at June Term, 1868, and re-enacted and ratified and confirmed by an act of the General Assembly, ratified the 11th day of August, 1868," so that the said bonds could not possibly have been issued before the 11th of August, 1858.

On this state of facts, the theory advanced by the Supreme Court of North Carolina, in the case of *Commissioners vs. Call*, 123 N. C., 308, 1898—namely, that these two Forsyth County cases of *Hill vs. Commissioners* and *Belo vs. Commissioners*, could have decided that the ordinance of 1868 gave power to issue the Forsyth County bonds, and yet, that, consistently with these two cases, the North Carolina Court, in this later Wilkes County case, could decide that the constitution of 1868, which was ratified by the people April 24, 1868, had wholly repealed the said ordinance of 1868, and that this later decision did not, in effect, overrule the two Forsyth County cases—upon this state of facts, we say, that theory is absurd, and is completely refuted by the chronology. If the constitution which went into effect *April 24, 1868*, completely repealed the ordinance of 1868 incorporating the Northwestern North Carolina Railroad Company as to the power of counties to issue bonds, then the Court ought not to have decided in 1870 and 1877, in the

two Forsyth County cases, that the said ordinance gave power to issue the Forsyth County bonds there in question, for those bonds were issued long after April 24, 1868, and bear on their face evidence that *they were issued after August 11, 1868*, for they recite the act of that date, as above stated.

Power of Counties given by the Ordinance of March 9, 1868, had not Expired by Limitation in 1889, when the Bonds in Suit were Issued.

The Supreme Court of North Carolina, in the case of *Commissioners vs. Call*, 123 N. C., 308, 1898, refer to the fact that the charter of the North Carolina and Atlantic Railroad Company, or the Atlantic and North Carolina Railroad, Chapter 136 of the laws of 1852, provides, in Section 45, that "If the said road be not completed within six years after the ratification of this act, this charter shall be forfeited," and the Court says:

"Therefore, even if the powers granted in the act of 1852 had been given to the Northwestern North Carolina Railroad Company, or the counties in its interest, subject to the 'same restrictions,' those powers would have expired by their own limitation long before their attempted exercise twenty-three years thereafter."

This language of the Supreme Court of North Carolina has no support in the ordinance of 1868 chartering the Northwestern North Carolina Railroad Company, or in the parts of the Act of 1852 referred to in the said ordinance. Section 12 of the said ordinance provides "that all counties or towns *subscribing stock* to said company *shall do so in the same manner and*

under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company." This reference to the Act of 1852 incorporating the North Carolina and Atlantic Railroad Company is made only so far as the said Act of 1852 relates to the manner, rules, regulations and restrictions in *subscribing for stock*. It does not, by reference, make the *entire* Act of 1852 a part of the said ordinance, nor does it make the provisions of the Act of 1852 with respect to the corporate life and existence of the company a part of said ordinance; and the six years' provision in Section 45 of the Act of 1852 has no application to the Northwestern North Carolina Railroad Company.

Furthermore, this question of the corporate existence of the company is a matter which is expressly and specifically covered by other provisions of the said ordinance of 1868, and, under familiar and well settled rules of construction, the *express* and *specific* provisions of said ordinance would govern the railroad company created by the ordinance as to the matters thus expressly and specifically covered, even if the ordinance by preference made the *entire* Act of 1852 a part of the ordinance—and it does not. Section 1 of said ordinance expressly provides that the said company "shall have a corporate existence as a body politic *for the space of ninety-nine years*," and nowhere in the said ordinance is there any provision for any earlier termination of its charter, or for any forfeiture for not constructing this road.

Moreover, the said ordinance expressly provides for and contemplates the construction of the Northwestern North Carolina Railroad *by divisions*, and not necessarily all at one time, and there is no forfeiture pre-

scribed for failure to construct any one division, nor is there any forfeiture prescribed if the railroad company, after having constructed one division of the road, waits for a time before constructing another division.

Thus Section 5 of said ordinance provides that the said company shall proceed to construct said road, with one or more tracks, as speedily as practicable, in sections of five miles each, to the towns of Winston and Salem, in Forsyth county, which portion of said railroad when completed shall constitute its first division. Here, then, is a provision that the said railroad shall be constructed "as speedily as practicable, in sections of five miles each, to the towns of Winston and Salem," and that this portion of the railroad when completed shall constitute its "*first division.*" No express provision is made in the act as to when any other division of the road is to be completed. Even this division to Winston and Salem is to be completed only "*as speedily as practicable,*" and no forfeiture is provided even if this provision is not complied with.

It appears from the two Forsyth county cases *(Hill* and *Belo Cases)* that immediately upon its incorporation, in 1868, the railroad company began to obtain funds with which to construct its railroad to the towns of Winston and Salem, in Forsyth county. This division of the railroad was constructed. Suppose that it had happened afterwards that no further railroad had been constructed. Said ordinance is wholly silent as to any forfeiture of the charter for not constructing additional railroad. If the ordinance had intended to provide for any such forfeiture, doubtless it would have provided what was to be done with the railroad already constructed, whether that railroad was to be operated by the Northwestern North Caro-

lina Railroad Company, or whether it was to pass into the ownership of some other company.

The true view and the only view to be taken of this said ordinance on the point now under consideration, is that the Northwestern North Carolina Railroad Company might construct its road by sections or divisions from time to time, and that there was no forfeiture prescribed for any failure to complete the road to the terminus designated by Section 1, that is, some point on the northwestern boundary line of the State of North Carolina.

In addition to the foregoing views, it is to be observed that if the Northwestern North Carolina Railroad Company was liable to have its charter forfeited for not exercising its franchise and constructing its railroad to its whole extent, *this was a matter solely between the state and the railroad company*, and to be taken advantage of only by *quo warranto* proceedings There is no suggestion in the record that any such proceedings have been had or attempted. So long as the state permitted the road to exercise the franchises and powers conferred by the said ordinance, and failed to exercise any right of forfeiture, if any existed, it is not open to any county which, under the powers given by the said ordinance, had subscribed stock and issued bonds in aid of the construction of the said railroad, to say that the said charter was liable to be forfeited, and, therefore, the county bonds were invalid. This is a matter with which the county has no concern. Especially has the county no concern in this matter, where the admitted fact is, as in the present case, that the railroad actually was constructed in the county of Wilkes and the county obtained all the consideration which was contemplated for the issue of these bonds.

The authority to issue bonds is not only a power conferred upon the county or municipality, but a privilege of the railroad company.

On pages 12 and 15 of the record are Sections 12 and 13 of the charter, which give *this corporation* "power to construct branches of" the road, and conferred the authority and power given in Sections 33 and 34 of the Act of 1852, which are as follows (Record, p. 54):

"Chapter 136 of the Laws of North Carolina, Session 1852.

"SEC. 33. **Be it further enacted, That it shall be lawful for any incorporated town or county near or through which said railroad may pass to subscribe for such an amount of stock in said company as they shall be authorized to do by the inhabitants of said town or the citizens of said county, in manner and form as hereinafter provided.**

"SEC. 34. Be it further enacted, That the corporate authorities of such town, of the justices of the peace of such county, a majority of the justices of the county concurring, to make an order requiring the constable of such town and the sheriff of such county, at such time and on such notice as they shall direct, to open a poll and take the sense of the voters of such town qualified to vote for town officers, and of the voters of such county qualified to vote for members of the house of commons of the General Assembly, whether the officers of said town and the justices of the peace of said county shall subscribe to the stock of such company for such sum as the order shall propose, and the constable shall make return of the number against it, and the sheriff shall, in like manner, make return as to the vote in his county to the first court thereafter, to be held for such county and it shall be the duty of the sheriff to notify each justice of said county to attend at the court-house, to which he may make his returns of said poll."

In the case of the County of *Scotland vs. Thomas*, 94 U. S. Reports, on page 689, Justice BRADLEY says:

"The specific question in the present case, therefore, is whether the authority given the counties and towns in 1847 to subscribe to the capital stock of the Alexandria and Bloomfield R. R. Co. has become extinguished by the subsequent consolidation of that company with other companies, irrespective of the Constitutional provisions referred to."

Justice BRADLEY says, also, on page 688, after quoting the words of the Constitution of Missouri, similar to the words of the North Carolina Constitution of 1868, that "This prohibition, it will be observed, is against the Legislature's authorizing municipal subscriptions or aid to private corporations; *it does not purport to take away any authority already granted.*"

On page 693 Justice BRADLEY goes on to say: "But the case has other aspects, which it is necessary to take into consideration.

* * * * * *

"The project of the railroad promised a great public improvement, conductive to the interest of Alexandria and the counties through which it would pass." "The power was sought at the hands of the Legislature, and was given." "It was relied on by those who subscribed their private funds to the enterprise."

Speaking of this power he says: "Why it should not still attach to this portion of the road as one of the rights and privileges belonging to it, into whose hands soever it comes, by consolidation or *otherwise*, it is difficult to see. * * * Subscription to the stock *was not only a power of the county, but a privilege of the company.*"

This is the view taken of this question by BYNUM, Justice, in *Belo vs. Commissioners*, and FURCHES, Justice, in his dissenting opinion in *Commissioners vs. Call.*

These powers are not only conferred upon the Counties, but are privileges of the company, the North Western North Carolina Railroad Corporation. It follows, therefore, that Wilkes County was in "the same category" with Forsyth County.

The route of the road was determined by both the Legislature and the corporation. This was one of the privileges conferred upon the company, as said by Justice BRADLEY, in the case cited above, the *Thomas case*. And, besides, it is not for the County of Wilkes, which voted to issue bonds for a railroad by a certain route, to be heard to say, in a suit by an innocent bondholder, years after it was determined, that there was no power to construct a railroad by that route.

We do not understand that the Act of 1879, referred to by Justice HARLAN, to have been adjudged, for all purposes, null and void by the Supreme Court of North Carolina. Section 4 of the Act was adjudged void, but not Section 1. In the case of *Bank vs. Commissioners*, 119 N. C., 214, an act is expressly declared valid as a railroad charter, because the certification cannot be impeached by the journals, but, void as a taxing act, because, for that purpose, under the Constitution, it can be impeached by the same journals.

It is well settled, *in all courts*, that an act can be unconstitutional in part and constitutional in other respects. So, Section 1 of the Act of 1879 is valid, because, passed, in all respects, and certified, as required by the Constitution. See Act of 1879, and especially Section 5, &c., &c., where, upon its face, it is shown to *have been read three times and ratified*. The case of *Bank vs. Commissioners*, 119 N. C., 214, is decisive of this, being directly in point, and, indeed, is the case out of which all this litigation

has sprung. And, further, if the route was not a proper one, it was acquiesced in by the county when the company could have been forced by mandamus to have selected the proper one, or it could have been enjoined, anyhow, from constructing the road on the route determined upon.

Even if the journals of the General Assembly of North Carolina do not show that the Act of February 20, 1879, was passed in such a manner as to make that portion of the act which relates to the issuance of county bonds and levy of a tax comply with Section 14, Article II., of the Constitution of North Carolina, yet such omission on the journals does not render the entire Act of February 20, 1879, void; for those portions of said act which relate to the issuance of bonds and the levy of taxes therefor are separable, and may be stricken out without in any way interfering with Section 1 of said act, which provides for the construction of a railroad into Wilkes County by name.

The rule is well settled in North Carolina, as well as elsewhere, that, if a part of an act is unconstitutional and void; and, if the unconstitutional part of the act is separable from the remainder of the act, such unconstitutional part may be stricken out and the remainder of the act will stand as valid.

Applying this rule in the present case, it is obvious that Section 4 of the Act of February 20, 1879 (Record, page 15), which section provides that any

county, by vote of a majority of the voters, may subscribe for stock of the company and issue bonds in payment therefor and levy taxes to pay the same, is separable, and can be stricken out without doing any violence to the remainder of the act, and the remainder of the act may stand. The test in such cases is this: Unless it can be shown or presumed that the Legislature would not have enacted the valid parts of the act standing alone, without accompanying them with the enactment of the invalid parts of the act, then the valid parts of the act are separable and stand as valid. Let us apply this test in the present case. Section 1 of said Act of February 20, 1879, provides as follows (Rec., p. 14):

"That section thirteen of chapter seventeen of the ordinance of the convention of one thousand eight hundred and sixty-eight, ratified the ninth day of March, one thousand eight hundred and sixty-eight, be amended by adding the words 'and one of which shall be constructed from the towns of Winston and Salem, up the valley of the Yadkin by the way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's factory, in the county of Caldwell, which branch shall be known as Second division."

Observe that this section is not anywhere connected with or made conditional upon the enactment of any other section of the said Act of February 20, 1879, and the reading of the other sections leads us to the same conclusion, namely, that said Section 1 is not connected with or dependent upon them. It cannot be said that the said Section 1 would not have been passed without the said Section 4. Said Section 1 is an authority to construct the railroad through Wilkes County, but the construction of such railroad is not mandatory. Section 4 is an authority to counties on

vote of the people to subscribe for the stock and issue bonds in payment therefor. It does not appear but that the Legislature would have given this authority to construct a road even though it had not given the authority to a county to issue bonds. On the contrary, it does appear that the authority is given to construct the road, and this authority is given unconditionally, although the Legislature knew that it might happen that no bonds would ever be issued by any county; for Section 4 is a mere *permission* and it did not appear at the time the act was passed whether or not any county would avail itself of the power. So that it stands demonstrated that the Legislature did in Section 1 intend to give the power to construct this road although no county bonds might ever be issued in aid of it.

Said Section 1, therefore, of the Act of February 20, 1879, is separable from the said Section 4, and stands as a valid enactment, although Section 4, which authorized a county to subscribe to the stock of the railroad company and to issue bonds therefore and levy taxes for this purpose, is stricken out because the act was not passed as required by Section 14 of Article II., of the Constitution of North Carolina, which prescribes how acts providing for the levying of a tax must be passed.

In support of the foregoing proposition, it is only necessary to refer to a few cases in the Supreme Court of North Carolina.

In *Rodman vs. Town of Washington*, 122 N. C., 39 (1898), an act levying a tax for school purposes was under consideration by the Court. It was admitted

that the said act, so far as the school tax was concerned, ought to have been passed in accordance with the requirements of Section 14 of Article II. of the Constitution of the State, and that the journals of the House and Senate ought to have shown the yeas and nays on the several readings, and that these provisions were not complied with. But the act also contained other provisions, not provisions for levying a tax, and in regard to those other provisions the Supreme Court of North Carolina in its unanimous opinion, said (page 41):

"It therefore follows as a logical deduction from what we have said that that part of said act authorizing the levy and collection of this special tax is unconstitutional and void, but it does not follow that the other parts and provisions of said act are void, and we do not understand that the learned Judge who tried the case below so decided (*Russell v. Ayer*, 120 N. C., 180; *Gambill v. McCrady*, 75 N. C., 509)."

See, also, to the same effect, *Union Bank of Richmond vs. Commissioners of Oxford*, 119 N. C., 214 (1896), where that Court, while holding that an act was void so far as the creation of indebtedness was concerned, apparently recognized that the act might be valid as a railroad charter.

If, therefore, in addition to the said ordinance of March 9, 1868, any further legislation was necessary making a definite location of the route of the railroad near or through Wilkes County before said railroad could be constructed there, then said further legislation was had in Section 1 of the Act of February 20, 1879; and after the passage of the said Section 1 of the Act of February 20, 1879, there could be no possible question of the right of the railroad company to proceed to construct its road through Wilkes County

in accordance with the general route prescribed in section of the ordinance of 1868. In any view, therefore, when said Section 1 of the Act of February 20, 1879, was passed, Wilkes County was a county "near or through" which said railroad might pass and was authorized on the vote of its qualified voters being had, to subscribe to stock of the railroad company and to issue bonds of the county therefor.

We notice in the argument of the learned counsel for the county that the answer he makes to the proposition that Section 1 of the Act of February 20, 1879, is valid and authorized the construction of the road there, is that so to hold would be in effect and indirectly over-riding the provision of Section 14 of Article II. of the Constitution, and that it is not permissible to do indirectly what can not be done directly.

The reply to such an answer is obvious. The ordinance of March 9, 1868, was the enactment which authorized the subscriptions to capital stock of the railroad and the issuance of county bonds therefor. This enactment, together with the Act of 1852, by reference made part thereof, authorized counties "near or through" which said railroad might pass to subscribe for stock and to issue county bonds therefor and levy a tax for the payment thereof. These provisions were all complete in the said ordinance of March 9, 1868, and needed no further legislation. The general route of the railroad was also complete in Section 1 of said ordinance of 1868, and this general route took the railroad "near or through" Wilkes County. Here then was complete authority to make a subscription to the capital stock, to issue these bonds and levy taxes in

payment therefor, and so far as these are concerned, no further legislation was necessary.

It cannot be claimed that the people of Wilkes County were taken by surprise in the matter of the authority to issue these bonds, for this ordinance of 1868, which the Supreme Court of North Carolina has held remained in full force and effect after the Constitution of 1868 was adopted, made express provision for the issuance of bonds by any county near or through which the railroad described in Section 1 of the said ordinance might pass, that is, made express provision for the issuance of bonds by Wilkes County. This ordinance was continued in force by the Constitution and after the Constitution was adopted, as was held in the *Hill case* and *Belo case*. Therefore, no purpose of Section 14 of Article II. of the Constitution of preventing surprise in tax matters or preventing such matters going through without consideration can be urged as against these provisions of the ordinance of 1868.

The express authority to issue these bonds of Wilkes County had been given in the ordinance of 1868. After the passage of that ordinance, it was no longer a question whether or not Wilkes County had the power under existing law, namely, that ordinance, on the vote of the people to issue these bonds in aid of this railroad *at some time or other*. At the very utmost, all that could be claimed would be that some further legislation was necessary making a *more definite location* of the railroad before the company was authorized actually to build the railroad near or through Wilkes County. Although, as we have shown above, any such claim is utterly without foundation, yet in order to meet even this unfounded claim, we say that if any

such further legislation was necessary before the railroad company could proceed with the construction of its railroad in, near or through Wilkes County, *then such further legislation was had in Section 1 of said Act of February 20, 1879. This legislation in said section was not legislation authorizing Wilkes County to issue bonds, but was merely legislation relating to the more definite location of the railroad.*

The Code of North Carolina contains general provisions authorizing counties to subscribe for stock and to issue bonds in aid of the construction of railroads, and such legislation is required by Section 14 of Article II. of the Constitution of North Carolina to be passed with certain formalities. Of course, before any of those provisions of the Code can have effect, there must be a railroad company either in existence or in process of formation, the stock of which can be subscribed for, and such company must have charter authority to construct a railroad. But it could not for a moment be contended that the same formalities were required by Section 14 of Article II. of the Constitution of North Carolina in the incorporation of such railroad company and in the giving of legislative authority for the construction of its road as are required for the enactment of the general provisions of the Code relating to county subscriptions to railroads and the issuance of county bonds therefor. The incorporation of the railroad and the authority to construct the railroad is one thing and an entirely different thing from the authority to issue county bonds.

So in the present case, the authority to issue these bonds was given in the ordinance of 1868, the authority being conferred upon any county "near or through" which the railroad described in Section 1 of said ordi-

nance might pass, and such railroad according to the general description in said Section 1 of the ordinance at the very least might pass "near or through" Wilkes County. The authority, therefore, to issue these bonds was complete in the ordinance of 1868.

When Section 1 of the Act of February 20, 1879, was enacted, it did not give any authority whatsoever to issue these bonds, if that authority did not exist before. If the railroad described in Section 1 of the ordinance of 1868 might not pass near or through Wilkes County, then the said ordinance of 1868 gave no authority to issue these bonds, and no provision of Section 1 of the Act of February 20, 1879, locating more definitely the route, could give any such authority. In other words, the authority for the issuance of these bonds is complete under the said ordinance of 1868. Section 1 of the Act of February 20, 1879, not only did not but could not add to this authority.

II.

There was lawful authority for the issue of these bonds in the present case UNDER THE CODE, **sections 1996 to 2000. These sections of the Code were originally adopted as the act of April 10, 1869. They were afterwards adopted as sections 1996 to 2000 of the Code of North Carolina of 1883. It is admitted by all that these sections of the Code, 1996 to 2000, were adopted in accordance with the constitution as respects the three several readings and the entry of yeas and nays upon the journal, etc.**

The said act of April 10, 1869, as well as said sections of the Code 1996 to 2000 are printed in full in the Appendix at the end of this Brief.

The Supreme Court of the United States were careful in answering the first question (180 U. S.) to say that the Federal court should follow the decisions of the State Supreme Court as controlling upon the inquiry whether legislative enactments of 1868, 1879 and 1881 were passed in such manner as to become, under the constitution, laws of the State, and thus the Supreme Court limited the effect of these decisions of the State Supreme Court to the point whether they had become laws of the State under Article II., Section 14, of the constitution. [Text of said Section 14, see Appendix to this Brief.] The Supreme Court of the United States, by thus carefully limiting its answer to the first question, has, in effect, stated that these decisions of the Supreme Court of the State of North Carolina, as to the *construction* of

these sections of the Code, are not to be controlling in the Federal courts, and hence the general rule applies that the Federal courts should follow the decisions which were in existence when the bonds were issued, if there any, or, if not, then they should consider the questions for themselves, and they are not bound by by any subsequent decisions of the State Supreme Court.

Hence, decisions of the Supreme Court of North Carolina, *construing* the Code made *after* the bonds in question were issued, do not bind the Federal courts, if such subsequent decisions of the Supreme Court of North Carolina are not in accordance with the general principles of jurisprudence, but the Federal courts may, and should, exercise their own independent judgment. There is a long line of decisions to that effect in the Supreme Court of the United States, and these decisions relating to the construction of statutes are expressly recognized and distinguished by the Supreme Court of the United States in its opinion (see *Wilkes County vs. Coler*, 180 U. S., 506-531).

It will be noticed that on page 519 of the case last cited, this Court says, referring to the acts of 1868, 1879 and 1881, as follows:

> "Observe that the issue is not as to the construction, meaning or scope of a statute, but whether that which purports to be a legislative enactment ever became a law for any purpose."

Under this decision of the Supreme Court of the United States, the Federal Courts are, of course, not bound by the decisions of the Supreme Court of North Carolina construing the Code *after* the bonds were issued.

A vote of the qualified voters of the county was had as required by the Constitution and by these Code Sections 1996-2000.

These sections of the Code required an election and "a vote of the majority of the qualified voters" (see Constitution, Art. VII., Sec. 7, in Appendix to this Brief) of the county in favor of the proposition of subscribing the stock and issuing the bonds. This provision was complied with in the case of this present issue of bonds.

THE BOND recites it (Record, p. 16).

THE COMPLAINT (paragraph 22, Record, p. 7) alleges compliance.

THE ANSWER of the county commissioners (paragraph 24, Record, p. 27) also admits compliance with this provision of the Code.

The recital in the bond is that the bond is (Record, p. 16):

"Authorized by a vote of the majority of the qualified voters of Wilkes County by an election regularly held for that purpose, on the 6th day of November, A. D. 1888."

Said bonds recite that they are issued by authority of the act of February 20, 1879. But the recital of the act (if that act of February 20, 1879, be held not to give authority) would not invalidate the bonds, or render ineffective the recital of the vote, if they were, in fact, authorized by some other act, as sections 1996 to 2000 of the Code, now under consideration. See the opinion of this Court in this very case on the former hearing in this Court, *Wilkes County vs. Coler*, 180

U. S., 506, 524-525; *Evansville vs. Dennett*, 161 U. S., 434; also see *Anderson County vs. Beal*, 113 U. S., where the wrong act was recited. In that case, notwithstanding the bonds recite the wrong act, the Court held, as respects the recital of the election, as follows, to wit (p. 239):

"In view of all this, the statement by the commissioners in the bond that it is issued 'in pursuance to the vote of the electors of Anderson county of September 13, 1869,' is equivalent to a statement that 'the vote' was a vote lawful and regular in form, and such as the law then in force required in respect to prior notice."

This recital, therefore, of the election in this Wilkes County bond is a recital of an election under sections 1996 to 2000 of the Code, and is conclusive in favor of the *bona fide* holders of these bonds, as was held in *Wilkes County vs. Coler*, 180 U. S., 506, 524, 525, and in the said case of *Anderson County vs. Beal, supra.*

Sections 1996 to 2000 of the Code do not violate Article 5, Sections 6 and 7, of the Constitution as to "Special purpose," "Special object" or "Special approval" of the General Assembly.

Said Sections 6 and 7, Article 5, of the Constitution are as follows:

SECTION 6. "The taxes levied by the Commissioners of the several counties for county purposes, shall be levied in like manner with the State taxes, and shall never exceed the double of the State tax, except for a special purpose, and with the special approval of the General Assembly."

SECTION 7. "Every act of the General Assembly levying a tax, shall state the special object to which it

is to be applied, and it shall be applied to no other purpose."

It was objected by the State Court in the case of *Commissioner vs. Call, supra*, and in *Commissioners of Stanly County vs. Snuggs*, 121 N. C., 394, 400, 401, cited in the *Call Case*, page 323, that these provisions of the Code are a *general* act, and that, because this is a *general* act as distinguished from a *special* act, it violates Article V., Sections 6 and 7, of the constitution, which provides, in substance, that taxes levied by the commissioners of the several counties for county purposes shall be levied in like manner as the State taxes, except for a special purpose, and with the special approval of the General Assembly, stating the special object to which the tax shall be applied.

(a) **In the present case, however, there is not a word or a syllable in this record to show that the county tax necessary for these bonds would exceed double the State tax; therefore, the question does not arise.**

(b) **If, however, it had been shown in the record in this case that the county tax for these bonds might exceed double the State tax, then these bonds are, nevertheless, valid:**

First, because the Code does not violate the provisions of Article V., Section 6 and 7, above referred to. The constitution only requires that the Legislature give

special *approval* to the special *purpose* for which any tax is levied in excess of the rate named, but such special approval may be given to all the counties, as well as to any one county, the object of the provision of the constitution being to require the special assent of the Legislature to the special *purpose*. If the rate referred to in Article V., Section 6, is to exceed the double of the State tax, this section requires the Legislature to specify the special purpose for which it may so exceed the State tax. The Legislature could not authorize such excess by an Act, *general* or special, which only named "*county*" *purposes* generally, and did not specify the special or particular purpose, but it is not necessary that the Legislature should in each instance specify by name any particular county or counties. The specification required is only a specification of a special purpose.

Legislative authority to subscribe for the stock in a railroad company and issue bonds in payment of such subscription is a *special purpose* within the meaning of this section, and so the sections of the Code, 1996 to 2000, being the Act of April 10, 1869, do specify the special purpose for which the tax is to be levied. It is not necessary to name by name each particular county. If these sections of the code had provided that the county commissioners of the county, A, B, C, D, etc., naming all the counties in the State, should have power to subscribe for stock in any railroad company, etc., obviously this would be good, for the very Section 6, Article V., of the constitution, referred to, contemplates that such taxes may be levied by all "the several counties" of the state. The constitution does not say that any special act is required, but only requires that the purpose be specified, and that the

tax and the purpose have the special approval of the General Assembly.

The propositions of the Supreme Court of North Carolina on this point seems to be, in effect, that if the legislature passes a special act for each county in the state; that is to say, ninety-five acts, each act exactly alike, except that one act applies to one county and another to another, and so on through all the ninety-five acts, the legislation is good; but if the legislature, instead of doing this, enacts precisely the same act and says that this act shall apply to all counties in the state, then such an act is bad. Such a view is, of course, unsound, and, if that be the view of the state Supreme Court, the federal courts cannot be expected to follow it as to negotiable bonds issued before such state decision was made.

AND, SECOND, *however this point may be decided, a ruling one way or the other would not invalidate these bonds. A bond may be a valid obligation, although there is not sufficient tax to pay it.*

Such bonds could be paid by as much tax as could be levied, and, if at any time the legislature did pass a special act giving its special approval to the levy of a further tax, then the defect of a lack of power to tax would be removed, if such defect existed. Therefore, on this point, the objection raised by the Supreme Court of North Carolina must fall. That there may be bonds which are valid, although there is a tax-rate limit, is well settled (see *United States vs. Macon County*, 99 U. S., 582). Article V., Section 6 of the Constitution of North Carolina is a mere limitation

upon the tax rate, such as was involved in this case of *United States vs. Macon County*, just cited. Under the decisions of the Supreme Court of North Carolina this constitutional provision does not affect the validity of the bonds, and in no view of the case could affect more than the method of having a valid, existing and binding obligation *paid*.

"The legislative practice has uniformly been, as far as we know, to give approval in advance, and thus confer the requisite legal authority to levy special taxes beyond the assigned limits, though if given after the levy, it would doubtless be equally effectual" (*Cromartie vs. Commissioners*, 87 N. C. Reps., on p. 140).

And in *Herring vs. Dixon*, 122 N. C., on page 423, the Supreme Court of North Carolina again distinguishes between the power to contract a valid indebtedness without special legislative sanction and the power to levy a tax to pay said indebtedness when it says:

"In *Vaughn vs. Commissioners*, 117 N. C., 429, while it was held that the commissioners could *incur a debt* for necessary expenses, without a vote of the people, it was not held that they could *levy a tax* in excess of the constitutional limit to pay it without special approval of the Legislature."

So under the rulings of *Cromartie vs. Commissioners* and of *Herring vs. Dixon*, the commissioners have the right to contract a valid debt without a special act, but only the process of collecting its payment would be affected by Section 6, Article 5, of the Constitution.

But this argument is unnecessary, as the record contains no evidence whatever that the payment of this obligation by the county will require a tax exceeding double the State tax.

FURTHERMORE, THIRD, *even if there be this tax-rate limit in Article V., Section 6, of the constitution of North Carolina, that is a mere limit. It does not appear as a matter of law on the face of the constitution, or on the face of these sections of the code, or on the face of these bonds, that in the instance of these particular bonds of Wilkes county the tax-rate limit would be exceeded. Whether or not this tax-rate limit would, as a fact, be exceeded, is a matter in pais, of which the holder of a negotiable bond, like the bonds in question in the present case, is not bound to take notice.* Moreover, as above stated, there is no proof in the present case that the county tax for these bonds would exceed double the state tax.

The sections of the Code 1996-2000 are prospective in their operation, and they are not limited to any railroad which had been begun either before the Constitution of 1868 was adopted or before the adoption of these sections of the Code by the Act of April 10, 1869.

The language of section 1996 of the Code is: "The Board of Commissioners," etc., "*shall have* power to subscribe stock," etc., "to aid in the completion of any railroad in which the citizens of the county *may have* an interest." *All this is future.* It applies to any railroad in which the citizens of the county may have an interest, either when the act was adopted *or at any time afterwards.* There is nothing in this language which restricts the operation of the act either to the time of the adoption of the constitution of 1868 or to

April 10, 1869, the time of the first enactment of the statute which became these provisions of the Code.

Any of the recent decisions of the Supreme Court of North Carolina contrary to the propositions here stated are wholly indefensible, and have no support in the language of these sections of the Code. Inasmuch as all of these decisions were rendered *after* these bonds were issued, they are not binding upon the Federal Courts (see the decision in this case on questions certified, *Wilkes County vs. Coler*, 180 U. S., 506, 531; and see also *Folsom vs. Ninety-six*, 159 U. S., 61, *supra).*

"No statute should be given a retrospective operation unless its words expressly require such construction" *(State vs. Littlefield.*, 93 N. C., 614).

What words in Section 1996 require that its operation be referred back to the date of the adoption of the Constitution, April, 1868, fifteen years before it was re-enacted in the Code of 1883, and one year before it was put in any shape on the statute books of North Carolina? Upon the same false principle of construction (a principle that can find no support in any book ever written on the subject), if section 1996 should be re-enacted in the Code of 1900, it would have no application to any road that might be built during the next century, but would apply to roads incomplete in the year 1868, thirty-two years before its enactment.

But this very principle for which we contend has been passed on by the Supreme Court of the United States in *James vs. Milwaukee*, 16 Wall., 159. In that case a statute authorized a city to lend its credit to any railroad company incorporated and organized; and this Court held that companies thereafter organized

were intended to be included, and the statute was applicable to them, as well as those then in existence. This Court said (pp. 160, 161) :

"The defendant in error insists that the power conferred was confined to companies already in existence at the date of the act, and such was the opinion of the court below. We entertain a different opinion."

In that case, there was no word denoting the future tense, no "shall," as in Section 1996, but the only words used were the adjectives, "incorporated and organized."

Erroneous Construction of the Word "Completion" in Section 1996 of the Code, by the Supreme Court of North Carolina in its Late Decision in the *Stanly County Case*, 121 N. C., 394, 1899.

[For text of Sections 1996–2000 of Code, see Appendix to this Brief.]

The Supreme Court of North Carolina, at this late day, in *Commissioners of Stanly County vs. Snuggs*, 121 N. C., 394, has taken a very narrow view of the word "completion." It has undertaken to say that these sections of the Code refer only to a railroad which had been begun, and that the word "completion" is not synonymous with "construction," but that the language here requires that there must have been an unfinished road.

The Court went further, and held that there must have been a road unfinished *at the time of the adoption of the constitution*, April 24, 1868, in order that these sections of the Code might have application. This in-

terpretation of the word "completion," we submit, is not the correct one.

It seems obvious that it is used as synonymous with the word "construction." This view is supported by the obvious difference between this language and the language used in the State Constitution as respects the issue of State railroad aid bonds. Article V., Section 4, of the Constitution prohibits the issue of State railroad aid bonds, "except to aid in the completion of such railroads as may be *unfinished at the time of the adoption of this Constitution.*" Section 1996 of the Code, adopted April 10, 1869, about one year after the framing of this provision of the State Constitution, omits the significant words—namely, "unfinished at the time of the adoption of this constitution." On no possible theory can these words be read into the statute. The Legislature did not put them there, and the Courts cannot put them there.

Erroneous Construction in the *Stanly County Case* by the State Supreme Court of the Words "any Railroad in which the Citizens of the County May Have an Interest," in said Section 1996 of the Code.

The Supreme Court of North Carolina held that the words of Section 1996 of the Code, "the citizens of the county may have an interest," do not mean exactly what they state, but hold that they require that the county, *as a county*, shall have a *pecuniary* interest in the railroad, in order that Section 1996 may apply to it. On this point it seems only necessary to state that no such words occur in Section 1996. This construc-

tion by the Supreme Court of North Carolina takes out the words "*the citizens*," and inserts the word "*pecuniary*," and thus it holds that the words "any railroad in which the citizens of the county may have an interest" are to be construed as follows, to wit; "Any railroad in which the county has a pecuniary interest." A mere statement of such a distorted construction of this language of the Code is enough to refute any such construction.

Here, too, again we may call the attention of this Court to the language of Article V., Section 4, of the Constitution of the State of North Carolina when it was dealing with the question of the right of the State to issue railroad aid bonds. There it refers to a railroad "in which the State has a *direct pecuniary interest*." [For text of said Section 4 see Appendix to this Brief.] This Section 1996 of the Code was adopted about one year after the said Article V., Section 4, of the Constitution. Doubtless the legislators had before them this provision of the constitution, or, at least, were familiar with it. The difference in the language was obviously intentional and significant.

The history of the adoption of this provision of the State Constitution (Art. 5, Sec. 4) as to State Railroad Aid bonds shows that it had a different purpose from that of the Code (§§ 1996-2000).

What is now Section 4 of Article V. of the Constitution was originally reported to the Constitutional Convention of 1868 by the Committee on Finance as follows:

"Until the bonds of the State shall be at par, the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State, except to supply a casual deficit, or for suppressing invasion or insurrection, unless it shall in the same

bill levy a special tax to pay the interest annually " (Journal, p. 354).

An amendment was proposed as follows :

" And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association or corporation, except to aid in the completion of such railroads and other works of internal improvements as are unfinished, and in which the State has a direct pecuniary interest, unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon " (Journal, p. 354).

This proposed amendment was further amended as follows :

Mr. Tourgee moved to amend by striking out " are ' in the fifth line and inserting " may be ; " insert after the word " unfinished " in the fifth line " *at the time of the adoption of this constitution.*" Strike out " and " in the fifth line and insert " or." This amendment of Mr. Tourgee's was accepted, and the proposed amendment, as amended, was adopted (Journal, p. 354).

On pages 85 to 90 of the convention journal is a report made January 29th, 1868, by the Treasurer of the State to the president of the convention as follows :

" SIR—I have the honor, in response to the resolution of your honorable body requesting me to furnish the convention a " statement of the indebtedness of the State, to what parties or sources, what amount to each, what is the amount of her endorsement for railroad or other improvements, what further endorsement of railroad bonds she is directed to make under any existing law or regulation, and, when passed, what property, or assets, or securities, said State holds for or on account of said indebtedness, what amount of stock the State holds in the several corporations of this State, and what amount of dividend or interest she receives annually from each source.'" * * *

The report of the State Treasurer shows that, prior to the meeting of the convention, the State had undertaken to issue its bonds in aid of certain railroads, and that, under the statutes then existing, the State was liable to be called upon for the issue of additional bonds, or for the guaranty and payment of additional bonds, and the State owned stocks in certain railroads, thus having a direct pecuniary interest in them. The amendment made to Section 4, Article V., of the Constitution above quoted was designed to enable the State, *without a vote of the people*, to carry out its contracts already entered into on railroads, &c., already then begun and to protect its interests in the railroads, &c., already begun. *With a vote of the people* the State was allowed to aid railroads without restriction.

As the Constitution, Article VII., Section 7, did not allow counties to incur any debt in any case (except for necessary expenses) without a vote of the people, the reason for the provision as to *unfinished* railroads in case of State aid, did not apply to counties, and was purposely omitted in the Act of April 10, 1869 (now Sections 1996-2000 of the Code).

Our view is supported by the following decision rendered by the North Carolina Supreme Court in 1869, the year following the Constitutional Convention.

In *Galloway vs. Chatham Railroad Company*, 63 N. C., 147, the suit was to enjoin an issue of State bonds in aid of a railroad company. The Court held that the bonds were unauthorized under the provisions of the constitution. In the course of the opinion (PEARSON, C. J., giving the same) the Court say, with

respect to the restrictions on the power of the State to incur debt, speaking of the debt existing at the time of the adoption of the Constitution of 1868 (p. 153):

"It will be found that most of the public debt was incurred in three modes: 1st, by subscribing for stock in railroad and navigation companies, and issuing bonds to pay for the stock, the state becoming a member of the corporation; this is the heaviest item, and amounts to, say, eight millions of dollars; 2nd, by issuing bonds of the state and exchanging such bonds for a like amount of the bonds of the corporation, the state not becoming a stockholder and taking collateral security of more or less value; this is the next heaviest item and amounts to about three millions of dollars; 3d, by endorsing the bonds of corporations and taking a mortgage or some other collateral security; this item amounts to about two millions.

"These are the three modes by which, judging from the past, it was apprehended the public debt might be so run up as to ruin the credit of the state and tarnish her honor and her reputation for good faith.

" * * * (p. 155. The suggestion that the credit of the state was given by this statute to aid in the completion of an *unfinished railroad* was not strongly urged on the argument, and, indeed, it could not be. An unfinished road is one that has been begun and partly worked on, and such a road is made an exception, on the ground that it might be proper to finish it in order to prevent a sacrifice of the work that had been done. There is no evidence that such was the fact in regard to this road. The other suggestion, that the state has a direct pecuniary interest in this road, was properly abandoned. The word '*has*' is in the present tense. The exception is obviously confined to roads in which the state had a direct pecuniary interest at the time of the adoption of the constitution; otherwise the state might, by a subscription for stock, become directly interested in every railroad or navigation scheme that should thereafter be projected, and thus the restrictions of the constitution would be of no effect whatever."

Note the difference between the language of the Constitution (Art. 5, Sec. 4) as to *State* aid bonds and the language of the Code as to *county* aid bonds. The Con-

stitution says "*has*," and note the comments of the Court on the present tense. The Code says "*may have*," &c., &c.

Of course, such of these decisions of the Supreme Court of North Carolina as were rendered after the bonds in question in the present case were issued are not binding upon this Court, and it is both the right and duty of this Court to construe this language of Sections 1996–2000 according to their natural and proper meaning.

Observe that the language of Section 1996 of the Code is not any railroad in which the *county* may have an interest, but any railroad in which *the citizens of* the county may have an interest; and therefore any financial interest of the county itself as a corporate body in the railroad, which is contended for by the learned counsel for the county, is utterly out of the question. Any such construction disregards the words "the citizens" and strikes them out of the statute.

The interest which Section 1996 of the Code contemplates that the citizens of a county may have in a railroad to be aided is clearly not a financial interest as stockholders. It would be the height of absurdity to suppose that this section of the Code meant that ALL *the citizens of the county must be stockholders* in a railroad, and thus have a financial interest in the railroad as a condition precedent to the county subscribing stock to the company. What an absurdity to suppose that this section of the Code contemplated that every man, woman and child in the county should own stock in the railroad company before the county could subscribe stock to the company.

Neither can Section 1996 of the Code contemplate that it is necessary that *some* citizens of the county

have a financial interest in the railroad *as stockholders* as a condition precedent to the county subscribing stock to the company. If this section read in this way, then if *some* citizens of the county owned stock in a railroad company which did not touch the county, and which was fifty or a hundred, or even two hundred miles distant from the county, nevertheless the Section 1996 of the Code so construed would give power to the county to subscribe to the stock.

None of these absurdities was intended by said Section 1996 of the Code. The word "interest" in this section must be construed in a rational way with reference to the subject matter, and when it is so read, it is clear that the interest spoken of is **the interest that the citizens of the county might have in any public improvement.**

"What else does this doctrine mean, if not that building a railroad, though it be built by a private corporation, is an act done for a *public use?* And the reason why the use has already been held a public one is that such a road is a highway, whether made by the government itself or by the agency of corporate bodies, or even by individuals, when they obtain their power to construct it from legislative grant" *(Olcott vs. Supervisors*, 16 Wallace, 678).

Within the meaning of Section 1996 of the Code the citizens of a county have an interest in any railroad running near or through the county, and this section would be confined accordingly to *such* railroads.

Even if the language of these sections of the Code—1996 to 2000—is to speak from the time of their earliest adoption—to wit, April 10, 1869—and if these sec-

tions are not prospective in their operations, they, nevertheless, authorized the issue of the bonds now in suit by Wilkes County, as they were issued in aid of a railroad which had been begun before April 10, 1869, and was then not completed.

There cannot be the slightest foundation in this language of Section 1996 of the Code for saying that it applies only to the completion of a railroad which had been begun *when the Constitution of 1868 was adopted.* There is not a word or a syllable in the said provisions of the Code lending any support to any such view. The utmost that could be claimed would be that these sections applied to the completion of a railroad which had been begun at the time these sections were adopted, which was in 1883, or, at the very earliest, April 10, 1869.

Even if this earlier date, April 10, 1869, be the one selected, then it is, nevertheless, true that these sections of the Code would apply to and authorize these Wilkes County bonds, since this railroad might be a railroad referred to in these sections, and these sections might properly speak of the subscription to the stock of this railroad company as necessary to aid in the completion of this railroad.

This company had been chartered by the ordinance of the Constitutional Convention, ratified March 9, 1868, over one year before the passage of these Code sections. Section 1 of the ordinance of March 9, 1868, authorized the construction of the *main line* into Wilkes County. A glance at the map will show this.

The line into Wilkes County was not a *branch* as erroneously contended by counsel on the other side. Forsyth County, as shown in the two Forsyth County cases, *Hill case and Belo case*, above quoted, had in 1868 issued bonds to aid in the construction of this road, such bonds being ordered issued at the June Term, 1868, of the Board of Commissioners of Forsyth County.

Furthermore, the affidavits printed in the Record, pages 65 *et seq.*, show that the work had been begun on the Northwestern North Carolina Railroad in October, 1868.

This is also conclusively shown by the North Carolina Act, ratified August 21, 1868, which the counsel for the county has been kind enough to print in his brief, page 9, entitled, "An act to amend an ordinance of the Convention entitled 'an ordinance to incorporate the Northwestern North Carolina Railroad Company.'" This act, passed in the August succeeding the adoption of the Constitution, authorizes *State* aid "for the purpose of aiding in the construction of the Northwestern North Carolina Railroad from Salem, in Forsyth County, to Mount Airy, in Surry County," without any vote of the people of the State, as required by the Constitution, Article V., Section 4 (reprinted in the Appendix of this Brief). This section of the Constitution provides:

"The General Assembly shall have no power to give or lend the credit of the State in aid of any corporation except to aid in the completion of such railroads as may be unfinished at the time of the adoption of this Constitution, or in which the State has a direct pecuniary interest, unless the subject be submitted to a direct vote of the people of the State and be approved by a majority of those who shall vote thereon."

This Act of August 21, 1868, undertakes to give such State aid, which it would have been impossible legally to give if the said Northwestern North Carolina Railroad had not been a railroad which at the time of the adoption of the State Constitution was an "unfinished" road; that is, begun and not finished, or one in which the State had a direct pecuniary interest, the latter of which we do not understand to be claimed by any one to be the case. The whole Act of August 21, 1868, therefore, proceeded upon the assumption that the said road was then a road which, in the language of the Constitution, was "unfinished" at the time of the adoption of the Constitution.

The same thing is true of the *Act of February 3, 1869*, printed in the brief of counsel for the county, page 10.

Furthermore, the *Ordinance of March 9, 1868*, adopted by the constitutional convention, expressly provides in Section 8 for State aid to this Northwestern North Carolina Railroad Company, and the said ordinance itself was adopted before the adoption of the Constitution, thus showing that the railroad was an "unfinished" road within the meaning of the Constitution at the time of the adoption thereof.

This railroad, then, was a railroad projected and begun and under construction at the time of the adoption of these sections of the Code, April 10, 1869. Obviously, therefore, these sections of the Code apply to this issue of bonds by Wilkes County to aid "in the completion" of such railroad.

Even if, however, the word "completion" mentioned in the Code refers to the completion of a railroad which had been begun at the time when the county voted to subscribe to stock and to issue bonds, then clearly under

such an interpretation this railroad was within the language of the Code, for it is clear that this railroad had been begun and completed to Winston long before 1888 when the vote was taken by the county on the issuance of these bonds.

See the order of the board directing the issuance of the bonds and its recitals, Record, page 42; see, also, Record, page 65 et seq.

The County is Estopped by the Recitals in the Bonds.

Inasmuch, however, as these sections of the Code—1996 to 2000—gave lawful authority to issue bonds to aid in the completion of a railroad, there was, under the familiar doctrine, *power to issue bonds*, under some facts and circumstances; and whether or not all of the facts and circumstances existed, such as that the railroad had been begun and was unfinished at the time of the adoption of the Constitution in 1868 or of this act, April 10, 1869, or at the date of the vote of the people of the county, is a matter *in pais* to be determined by the County Commissioners before the bonds are issued; and inasmuch as they have issued these negotiable bonds, and they are in the hands of *bona fide* holders, such holders are entitled to assume that they have been issued under and pursuant to the power which existed. This is under the familiar rule that, if upon any state of facts there was lawful authority to issue negotiable paper, then the holders of such negotiable paper are entitled to assume that such facts existed. The cases to that effect in this Court are so numerous and so well known to this Court that we need not cite them here.

See further on this point *(ante*, pp. 47–51, 89).

No "policy" of the State against Railroad Aid Bonds. Provision as to "unfinished" railroads applies only in case of State aid bonds, not county aid bonds.

The learned counsel for the county (Brief, p. 34) has attempted to make an argument that there was a *policy* of the State of North Carolina, as evidenced in the constitution of that State, adopted in 1868, against issuing railroad aid bonds by either the State or counties, except in aid of roads which were unfinished at the time of the adoption of the constitution. There was no such policy. The policy was just the contrary. The policy was this—that no State bonds should be issued to aid any *new* railroads, unless there should be a vote of the people, but with such a vote the State could aid any railroad, whether it had been begun or not at the time of the adoption of the constitution. If the railroad had been begun and was unfinished at the time of the adoption of the constitution, State bonds might be issued in aid thereof without any vote of the people.

As to counties, there was no distinction made as to whether the road was finished or unfinished at the time of the adoption of the constitution. A vote of the people of the county was required by the Constitution for the issuance of railroad aid bonds of a county in either case, whether a road had been begun or was a new railroad, and there was absolutely no distinction whatever made in the constitution between new roads and unfinished roads so far as respects county aid, and no such distinction existed in the Code, or in any other provisions of the statute.

Even the learned counsel for the county would admit that if there had been a special act authorizing the issue of these bonds, or if the Act of February 20, 1879, had been properly enacted by the Legislature, there would have been clear constitutional power to issue these bonds. How, then, can the learned counsel seriously argue that the Constitution of the State of North Carolina has adopted any policy as against the issue of county railroad aid bonds.

Further, as to Code Sections 1996-2000. These sections give power to issue the bonds. The objections of the County further answered.

The learned counsel for the county, in his argument in this case (Brief, pp. 31, 33 *et seq.*), in substance says, in regard to the Code provisions, Sections 1996 to 2000, originally adopted April 10, 1869, these are to be construed the same as the provisions in the Constitution of the State, Article V., Section 4, in regard to the issue of railroad aid bonds by the State. There is not anything in the Code or in any of the statutes or in the Constitution of the State which supports any such view. The insignificant language of Article V., Section 4, of the Constitution of the State, as applied to *State* railroad aid bonds, is purposely omitted when the Constitution deals with *county* bonds in Article VII., Section 7, and is purposely omitted from the said provisions of the Code.

The Supreme Court of North Carolina, in *Commissioners of Stanly vs. Snuggs*, 121 N. C., 394, committed an obvious and glaring error in holding that the same provision applied to a *county* as to a *State*.

We may note in passing that the learned counsel for the county, in dealing with Article V., Section 4, of the Constitution of North Carolina in connection with his argument in respect of Code Sections 1996 to 2000, would omit the significant words "*a direct pecuniary*," so that he would make a clause in that section, as respects State aid, read "a railroad which may be unfinished at the time of the adoption of the constitution, or in which the state has *an interest*," whereas that section of the Constitution really reads, "except to aid in the completion of such railroad as may be unfinished at the time of the adoption of this constitution, or in which the state has a *direct pecuniary* interest, unless the subject be submitted to a direct vote of the people of the state," etc. The claim of the learned counsel—that a "direct pecuinary interest" is required in the case of *county* bonds—is erroneous, and the late decision of the Supreme Court of North Carolina in the case of *Stanly County vs. Snuggs*, 121 N. C., 394, is plainly erroneous.

The learned counsel for the county speaks of the case of *Stanly County vs. Snuggs*, 121 N. C., 394, and says, in substance, that in that case the words in Code Section 1996, Act of April 10, 1869, "in the completion of any railroad in which the citizens of the county may have an interest" were construed as speaking of railroads *unfinished* at the time of *the passage of the act or the adoption of the constitution*. The fact is, the court, in the case of *Stanly County vs. Snuggs*, held that those words in the code were retroactive and went back to

the time of the adoption of the constitution (April 24, 1868), although there was not a word or syllable in the said Code, or in the act of April 10, 1869, to indicate that they were intended to have any such retroactive effect. The learned counsel has argued in his briefs heretofore presented:

"It was deemed a part of the *policy* of the state to place its subdivisions under the same restrictions as the state, by preventing them from aiding in the completion of a road not then begun."

And this view is urged in his brief filed in this present case (pp. 33, 34).

The fact is that there was no "policy of the state" to prevent a *county* from aiding in the completion of a road not begun at the time of the adoption of the constitution, or at the time of the passage of the act of April 10, 1869, nor even to prevent the *state* from aiding such road. The only restriction was that a *county* should not aid any road begun, or not begun, unless by a vote of the people. The restriction on the part of the state was less than this, to wit, the state was permitted, *without* a vote of the people, to aid any railroad which had been begun, and was permitted to aid *any* railroad (begun or not begun) *with* a vote of the people.

The learned counsel for the county, would omit from his quotation of Article V., Section 4, of the constitution, the significant words "*a direct pecuniary*" [interest], which apply only to *state* railroad aid *without* a vote of the people, and then goes on seriously to argue that the same direct pecuniary interest is necessary in the case of aid by a county, although neither the code nor the constitution makes any such provi-

sion. The bare statement of such an argument is enough to refute it.

Mistake of counsel for the county in stating that the construction given Section 1996 of the Code by the United States Circuit Court of Appeals makes part of said section surplusage.

In the brief of the learned counsel for the county (p. 31) it is stated in substance that half of Section 1996 is declared surplusage by the United States Circuit Court of Appeals in order to lean against the construction given by the State Court. This is clearly an error. The part of Section 1996 which the learned counsel for the county seek to show is regarded as surplusage by the United States Circuit Court of Appeals is the last part, to wit : " when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest." If these words were rejected, the section would then read : " The Boards of Commissioners of the several counties shall have power to subscribe stock to any railroad company or companies." This would allow a county in the extreme western part of North Carolina to subscribe to stock of a railroad company in the extreme eastern part of North Carolina, hundreds of miles from the subscribing county. No one contends or has contended for any such construction of Section 1996 of the Code. The construction given to this Section 1996 of the Code by the United States Circuit Court of Appeals and the proper construction of the said section is that these words, " when necessary to aid in the completion of any railroad in which the citizens of the county may

have an interest," do have a meaning and they mean that stock can only be subscribed to aid in the completion of a railroad in which the citizens of the county **are interested as a public improvement for the use and good of the public.** The words in Section 1896 are fit and apt to express exactly this meaning and they do not require any other meaning to be given to them. This is the natural meaning, a meaning which gives to the section a practicable construction, and not one which gives it an impracticable construction such as is contended for by the learned counsel for the county. The learned counsel for the county must reject altogether the words "*the citizens*" and strike them out of this section in order to give to the section the meaning for which they contend. They must also insert before the word interest the word "pecuniary" in order to have any such construction given to this section of the Code as they contend for.

Thus, it is clear that it is not the construction which was given to this Section 1996 of the Code by the United States Circuit Court of Appeals, but the construction which the learned counsel for the county would place upon the section which does violence to the language of the section and strikes out part of the section and inserts words which are not found there.

The numerous decisions cited by the learned counsel for the county (pp. 26–28) to show what the words "interest" or "interested" mean when used in other statutes relating to other matters have absolutely no bearing whatever on the construction of the word interest in Section 1996 of the Code.

We notice that the learned counsel for the county find it necessary as a part of their argument (p. 33), to support their construction of Section 1996 of the Code

to advance the proposition that the citizens of the county, "*by reason of vicinage, had no other or greater interest*" in a railroad running near or through the county than any other citizens in the State. This proposition is so manifestly absurd and false that it carries with it its own condemnation. Do the learned counsel for the county mean to tell us that in the case of a county which like Wilkes County has no railroad the citizens of the county have no interest in having a railroad constructed through the county or have no other or greater interest than any other citizen of the State who lives hundreds of miles away from the county and away from the place where the railroad is to be constructed? We will not waste the time of the Court or our own time in answering any such obviously false and absurd proposition.

So, also, whether or not the railroad had been begun before April 10, 1869, or even before the adoption of the constitution (April 24, 1868), was a fact in pais to be determined by the county commissioners before they issued the bonds, and not a matter with which the holder of these negotiable municipal bonds is concerned.

The Code of North Carolina is one act (Code, Section 3876), and went into operation November 1st, 1883 (Code, Section 3866).

At the end of volume 2 of the Code, at bottom of page 603, *it is declared that the requirements of Sec.* 14, Article 2, of the Constitution of North Carolina, have been complied with in the passage of the Code; and this is also admitted.

The bondholders are not estopped by the recital, on the face of the bonds, that they were issued under the provisions of the Act of 1879, *provided it can be shown* that the commissioners of Wilkes County, in ordering the election and issuing the bonds, *acted also* under the provisions of Sections 1996 and 1997 of the Code.

It is apparent that they did. They gave notice of exactly thirty days, the time required by Section 1996 of the Code; the order speaks of the matter to be submitted as a "proposition," the word used in said section. *Besides, article 21 of the complaint declares that these bonds were, as a matter of fact,* issued under the provisions of these sections, as well as of the charter and the amendatory acts of 1868, 1879 and 1881. And article 21 of the answer does *not deny* this fact, but merely denies the *legal conclusions* arising from said admitted fact.

So it is admitted that the Board of Commissioners was proceeding under the provisions of sections 1996 and 1997 of the Code, as well as under the *acts set out in the record and under the charter.* If this be true, then the bonds are valid, notwithstanding the recitals in the bonds, provided the Code provisions conferred on the board the power to issue them.

Knox County vs. Ninth Nat. Bank, 147 U. S., 91.
Cairo vs. Zane, 149 U. S., 122.
Anderson, &c., vs. Beal, 113 U. S., 227.
Evansville vs. Dennett, 161 U. S., 434.
Wilkes County vs. Coler, 180 U. S., 506.

See further on this point *ante*, pp. 47–51, 89; see p. 122.

Negotiability of Municipal Bonds and What Negotiability Means.

We need not remind this Court that municipal bonds are negotiable with all that the word negotiable implies. Of course there must be power to issue the bonds, that is, a statute or other legislative enactment authorizing the issue of the bonds on some facts and under some circumstances. There is then, using the words often used by this Court "power to issue." Where this power to issue municipal bonds exists and bonds have been in fact issued in negotiable form, such bonds are negotiable paper with all that the word negotiable implies. The *bona fide* holder of such a bond is not affected by any equities in favor of the maker of the bond. It is no defense to such a negotiable instrument that certain facts *in pais* did or did not exist before the bond was issued or when the bond was issued.

If the rule were otherwise, then every purchaser of a negotiable municipal bond, as for example a purchase of the bonds of Stanly County, in the City of New York or in the City of London, would be bound to take a journey to Wilkes or Stanly County, North Carolina, and would be obliged at his peril and at all hazards to ascertain for himself whether or not the facts *in pais* which the county set up as a defense to its bonds did or did not exist, and this would be true not only of the first purchaser of the bond from the county, but of all subsequent purchasers however remote and for all the time that the bonds would be outstanding. Thus, for example, a purchaser of such a county bond ten, fifteen or twenty years after its issuance would be obliged at his peril to ascertain and enquire, as the learned counsel for the county now seeks to maintain, whether or

not at the time of the issuance of the bonds the citizens of the county had an interest in the railroad, whether or not the railroad had been in fact begun before a certain date, and other similar facts. How could any purchaser of a bond ten, fifteen, twenty or thirty years after its date ascertain any such facts?

No record required to be kept of such facts as are now set up by the county as a defense.

No statute required the county to keep any records of any fact as to whether or not the citizens of the county had an interest in the railroad or as to the date when the railroad was begun, or other similiar facts, and even if the statute had required any records to be kept, it would require a further provision in the statute that such records should be constructive notice to all persons of the facts therein required to be stated. In the absence of any such provisions, the purchaser, who under the theory now advanced by the county must at his peril and at all hazards ascertain regarding these facts, could not rely upon any records.

How could a purchaser of these negotiable Wilkes or Stanly County bonds who bought them in the City of New York or in the City of London be expected to make a journey to the County in North Carolina, to ascertain these facts before he purchases the bonds? Who would buy any municipal bonds under such circumstances and with such a burden resting upon him? But even if he were willing to take that burden and sought in good faith to ascertain the facts, what sort of an inquiry must he make? Must he go to the county and open a kind of court of inquiry and ascertain by bringing in all the old settlers in the place who are accessable and obtaining their recollections, such as they might be, as to what were the facts in the

matter? Even the conclusions arrived at by such a court of inquiry would not be conclusive but they would be always open to contest in any action on the bonds. It would be absolutely impossible, therefore, for an intending purchaser in the City of New York or in London ten, fifteen, twenty or thirty years after the issuance of the bonds by any such inquiry to determine conclusively whether or not the facts *in pais* existed before or at the time of the issuance of the bonds.

But all these mistaken views of the counsel for the county arise from ignoring the principle that the county officers constitute tribunal which is to determine once and for all time whether the facts *in pais* required by law to exist precedent to and in the issuance of the bonds do exist. A statute when it empowers county officers to issue bonds when certain facts and circumstances exist contemplates that these officers are a tribunal to determine whether or not the facts exist, and the issuance of the bonds by such officers is their determination made once and for all that such facts exist. Such officers are elected by the people of the county to represent the people of the county, and to them the Legislature confides the function and power of issuing negotiable bonds. Such officers, those elected and those legally entrusted with this power, constitute the tribunal, and the only tribunal to ascertain these facts *in pais*. If such facts cannot be ascertained by such a tribunal, then there is no way by which they can be ascertained.

If after negotiable bonds have been issued by a county or other municipality it is open at any time to the county, five, ten, twenty or thirty years afterwards, to set up as a defense to the bonds that a certain fact *in pais* did or did not exist, *then such bonds are not*

negotiable according to the law merchant, but would be reduced to the class of obligations known as mere choses in action, open at all times and in the hands of any *bona fide* holder to any defense whatsoever which could be set up in respect of any non-negotiable obligation. It would be nothing but a solemn mockery any longer to designate any such obligation as a *negotiable* bond.

But even if any statute should require any record whatever to be made concerning the facts, it would not follow that merely because records were to be kept that, therefore, the bonds are non-negotiable, and that every purchaser of the bonds must go and consult the records and satisfy himself at his peril in regard to the facts. Something more than that would be necessary; it would be necessary that the statute should expressly provide that such records should be constructive notice of the facts. Let this once be understood and let defenses like this prevail against municipal bonds and the market for municipal bonds is gone. We do not believe this Court will give its assent to any such doctrine.

What better tribunal could there possible be for the determination of all these matters *in pais* than the officers who issue the bonds. It is for the interest both of the municipality and of the investing public that these matters be determined somehow and determined conclusively before or at the time of the issuance of the bonds. The officers elected by the citizens of the county and having by law the charge of the affairs of the county, are really the agents of the county; they act on behalf of the county. It is for the interest of the county that it should be able to have some officers to represent it and to bind it by their acts; otherwise how is the county ever to act or

to carry on its public business? There is no more injustice to the county in holding that these officers of the county represent the county, and that their acts bind the county when they issue municipal bonds than when they do other acts on behalf of the county.

Suppose an intending purchaser of county bonds goes to the county and says, "I would like to buy your bonds, but I want to be sure before I buy them that all the facts and conditions exist on which you are authorized to issue the bonds, and I want this matter settled so that when I take and pay for the bonds I may know that the question cannot be reopened and so that any one to whom I sell the bonds will not be bound to make any examination of these facts." Why should not the county be permitted to say in reply, "These facts have been investigated by our officers, chosen as required by law, to represent us in the matter. Our officers have investigated these facts and are satisfied that they exist and the county is willing to be bound by their action, and the county will issue to you its negotiable bond, which is an unconditional and incontestible obligation, so that neither you nor any subsequent holder of this bond to whom you may desire to sell it shall be bound to investigate into all the facts preliminary to its issuance, but the absolute obligation of the county is determined once and for all."

Why should not the county be permitted to have its officers thus represent it in the ascertainment of all these facts? It is the only practicable thing to do. It is absolutely impossible for each bondholder and each subsequent purchaser of the bonds to make an investigation of the facts for himself. If the obligation of the county is ever going to be made uncon-

ditional and incontestible, why should it not be made so by the action of the county officers in the issuing of a bond negotiable in form and in fact cutting off all equities and defenses on the part of the county ?

These principles of the negotiability of municipal bonds and the results that flow from such negotiability have been most emphatically stated by the Supreme Court of North Carolina in the case of *Belo vs. Commissioners of Forsyth County* (76 N. C., 489 ; 1877), before the bonds in question were issued. In that case the Court said :

" Such bonds can be issued only in pursuance of a special grant of power, and the party claiming the benefit of such bonds must show a power in the corporate body to issue them, but if he is a purchaser for value without notice and before maturity, he need do no more. If a municipal corporation has the power to issue bonds only on a compliance with conditions precedent, as for instance, as here, in pursuance of a popular vote, and the bonds are issued, the presumption is that the conditions have been observed, and that they are *prima facie* valid, though the defendant may show the contrary unless he is estopped by his own acts from doing so. The principle, however, of equitable estoppel is a most important element in the transaction, for whether conditions precedent have been complied with is a matter of fact to be determined by some tribunal invested with the power and authority to decide it and the decision when made should be final. It is not disputed that the power to make a subscription of stock and to issue the bonds was conferred upon the County of Forsyth by the ordinance of the Convention. It is equally clear that the tribunal which was authorized to issue the bonds only on compliance with the conditions precedent was the sole tribunal to determine the fact whether the conditions had been fulfilled. In this case the Justices of the County, a majority concurring, was the court or tribunal designated to carry the law into effect and was the tribunal to decide whether the conditions had been complied with, and their decision is final in a suit by a *bona fide* holder of the bonds against the municipality. This determination of the question of fact by

the Justices is manifested in two ways: first, by the records of their court, and second, by the recitals in the bonds issued by them."

As Mr. Justice HARLAN states, in the recent case of *Gunnison County Commissioners vs. E. H. Rollins & Sons*, 173 U. S., 255:

"Indeed, it is entirely competent for a state to provide by statute that all obligations, in whatever form, executed by a municipality existing under its laws, shall be subject to any defense that would be allowed in case of non-negotiable instruments. But, for reasons that everyone understands, no such statutes have been passed. Municipal obligations executed under such a statute could not be readily disposed of to those who invest in such securities."

Conclusion.

We have thus made good, we submit, the proposition with which we set out in this brief, namely, *that there is double lawful legislative authority* for the issuance of these bonds, namely (A) the ordinance adopted by the Constitutional Convention of North Carolina, March 9, 1868, and (B) the separate and independent authority of Sections 1996 to 2000 of the Code of North Carolina. The bonds were issued in conformity both to said Ordinance and said sections of the Code.

This Court, therefore, should hold the said bonds valid, and affirm the judgment of the Circuit Court of Appeals.

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Of Counsel for Appellees.

APPENDIX.

Provisions of Constitution, Ordinance of Constitutional Convention and Statutes of North Carolina, which this Court may desire to refer to in connection with this case.

1.

The following are provisions of the **Constitution of North Carolina** (see Code of North Carolina, 1883, Volume 2):

"ARTICLE II.

"LEGISLATIVE DEPARTMENT.

* * * * * *

SECTION 12. "The General Assembly shall not pass any private law, unless it shall be made to appear thirty days' notice of application to pass such a law shall have been given under such direction, and in such manner as shall be provided by law."

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SECTION 14. "No law shall be passed to raise money on the credit of the State or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each House of the General Assembly and passed three several readings, which readings shall have been on three different days and agreed to by each House respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the Journal."

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SECTION 16. "Each House shall keep a journal of its proceedings, which shall be printed and made public

immediately after the adjournment of the General Assembly."

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SECTION 21. "The style of the acts shall be: 'The General Assembly of North Carolina do enact.'"

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SECTION 23. "All bills and resolutions of a legislative nature shall be read three times in each House before they pass into laws, and shall be signed by the presiding officers of both Houses."

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"ARTICLE IV.

"JUDICIAL DEPARTMENT.

SECTION 19. "The laws of North Carolina, not repugnant to this constitution, or the constitution and laws of the United States, shall be in force until lawfully altered."

ARTICLE V.

REVENUE AND TAXATION.

SECTION 1. "The General Assembly shall levy a capitation tax on every male inhabitant of the State over twenty-one and under fifty years of age, which shall be equal on each to the tax on property valued at three hundred dollars in cash. The Commissioners of the several counties may exempt from capitation tax in special cases, on account of poverty and infirmity, and the State and county capitation tax combined shall never exceed two dollars on the head."

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SECTION 4. "Until the bonds of the State shall be at par, the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State, except to supply a casual deficit, or for suppressing invasion or insurrection, unless it shall in the same bill levy a special tax to pay the interest annually. And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association or corporation, except to aid in the completion of such railroads as may

be unfinished at the time of the adoption of this Constitution, or in which the State has a direct pecuniary interest, unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon."

* * * * * *

SECTION 6. "The taxes levied by the Commissioners of the several counties for county purposes, shall be levied in like manner with the State taxes, and shall never exceed the double of the State tax, except for a special purpose, and with the special approval of the General Assembly."

SECTION 7. "Every act of the General Assembly levying a tax, shall state the special object to which it is to be applied, and it shall be applied to no other purpose."

ARTICLE VII.

* 2 * * * *

SECTION 7. "No county, city, town or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."

SECTION 12. "All charters, ordinances and provisions relating to municipal corporations shall remain in force until legally changed, unless inconsistent with the provisions of this constitution."

2.

Ordinance of Constitutional Convention, passed March 9, 1868 (**authorizing bonds in question**), printed in full in Record, page 10.

3.

Chapter 136, Laws of North Carolina, Session of 1852, Sections 33 to 37, inclusive, (being the act referred to in Section 12 of the said

ordinance of March 9, 1868), printed in full in Record, page 54.

4.

Act of August 11, 1868, printed in full in Record, page 13.

5.

Act of February 20, 1879, printed in full in Record, page 14.

6.

Act of March 2, 1881, printed in full in Record, page 17.

7.

Act of April 10, 1869, being Chapter CLXII of the Laws of 1868, 1869, (p. 417), an Act to authorize the several counties of the State to take stock in railroad companies.

SECTION 1. The General Assembly of North Carolina do enact, that the County Commissioners of the several Counties in this State shall have power to subscribe stock to any Rail Road Company or Companies, when nessary to aid in the completion of any Rail Road in which the citizens of the County may have an interest.

SEC. 2. That the Commissioners of any County proposing to take stock in any Rail Road Company shall meet and agree upon the amount to be subscribed, and if a majority of the Commissioners shall vote for the proposition, this shall be entered of record, which shall show the amount proposed to be subscribed, to what company, and whether in bonds, money or other property, and thereupon the Commissioners shall order an election, to be held on a notice of not less than thirty days for the purpose of voting for or against the

proposition to subscribe the amount of stock agreed on by the County Commissioners. And if a majority of the qualified voters of the County shall vote in favor of the proposition, the County Commissioners, through their Chairman, shall have power to subscribe the amount of stock proposed by them, and submitted to the people subject to all the rules, regulations and restrictions of other stockholders in such company or companies : Provided, also, That the Counties, in the manner aforesaid, shall subscribe from time to time such amounts, either in bonds or money, as they may think proper.

SEC. 3. That all elections ordered under the second section of this act shall be held by the Sheriff under the laws and regulations provided for the election of members of the General Assembly. The votes shall be compared by the County Commissioners, who shall make a record of the same.

SEC. 4. In case the County shall subscribe the amount proposed in bonds, the Commissioners shall have power to fix the rate of interest, not to exceed the rate of eight per cent., when the interest on said bonds shall be payable, and at what place, and shall also fix the time and places of paying the interest, and shall also determine the mod and manner of the same ; and also to raise by taxation, from year to year, the amount necessary to meet the interest on said bonds.

SEC. 5. The taxes authorized by this act, to be raised for the payment of interest or principal, shall be collected by the Sheriff in like manner as other public taxes, shall be paid into the hands of the County Treasurer, to be used by the Chairman of the County Commissioners as directed by this act.

SEC. 6. This act shall be in force from and after its ratification.

Ratified the 10th day of April, A. D. 1869.

[The Act of April 10, 1869, was afterwards incorporated in the Code of 1883 and designated as Sections 1996–2000, next below reprinted]

8.

THE CODE SECTIONS.

Sections 1996-2000 of the Code of North Carolina of 1883 (**also authorizing bonds in question**):

"SEC. 1996. The boards of commissioners of the several counties shall have power to subscribe stock to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest.

SEC. 1997. The board of commissioners of any county proposing to take stock in any railroad company shall meet and agree upon the amount to be subscribed, and, if a majority of the board shall vote for the proposition, this shall be entered upon the record, which shall show the amount proposed to be subscribed, to what company, and whether in bonds, money or other property, and thereupon the board shall order an election, to be held on a notice of not less than thirty days, for the purpose of voting for or against the proposition to subscribe the amount of stock agreed on by the board of county commissioners. And, if a majority of the qualified voters of the county shall vote in favor of the proposition, the board of county commissioners, through their chairman, shall have power to subscribe the ammount of stock proposed by them and submitted ts the people, subject to all the rules, regulations and restrictions of other stockholders in such company or companies. Provided, that the counties, in the manner aforesaid, shall subscribe from time to time such amounts, either in bonds or money, as they may think proper.

SEC. 1898. All elections ordered under the preceding section shall be held by the sheriff under the laws and regulations provided for the election of members of the General Assembly. The votes shall be compared by *the board of county commissioners*, who shall make a record of the same.

SEC. 1999. In case the *county* shall subscribe the amount proposed in bonds, *the board of commissioners shall have power* to fix the rate of interest, not to ex-

ceed the rate of eight per cent., when the interest on said bonds shall be payable, and at what place, and shall also fix the time and places of paying the interest, and shall also determine the mode and manner of the same; and also to raise by taxation, from year to year, the amount necessary to meet the interest on said bonds.

SEC. 2000. The taxes authorized by the three preceding sections to be raised for the payment of interest or principal shall be collected by the *sheriff in like manner as other State taxes*, and be paid into the hands of the county treasurer to be used by the chairman of the board of county commissioners as directed by this chapter."

It is admitted by all parties and all courts that these sections of the Code are constitutionally valid, and authorize the issue of bonds on the conditions therein prescribed.

Code sections 1996 to 2000 were originally the above-printed act of April 10, 1869, the title of which is, "An act to authorize the several counties of the State to take stock in railroad companies." Chapter 171, Public Laws, North Carolina, 1868–69. Ratified April 10, 1869. Public Laws, North Carolina, 1868–69, page 417. Re-enacted in Battle's Revisal, January 1, 1874; re-enacted in Code of North Carolina which went into effect November 1, 1883.

We here print at length the said two cases just cited, fully and exactly as they appear in the official reports of the decisions of the Supreme Court of the State of North Carolina.

The report of the *Hill* case is as follows :

"John G. Hill et al. vs. The Commissioners of Forsythe County.*

[67 N. C., 367, June Term, 1870.]

An act of the General Assembly authorizing the People of a County to take stock in a Railroad Company, and to determine the question by a popular vote, and tax themselves to pay for it, is constitutional.

[*Taylor vs. Commissioners of Newbern*, 2 Jones Eq., 141; *Caldwell vs. Justices of Burke*, 4 Jones Eq., 323, cited and approved.]

Motion to vacate an injunction heard before CLOUD, J., at.....Term of Forsythe Superior Court.

This was an application on the part of the plaintiffs, who represented themselves as taxpayers and property holders of the county of Forsythe, in behalf of themselves and others, asking for an injunction against

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* "NOTE.—The case of *Simonton vs. The Commissioners of Burke*, involving the same question, was decided at this term, and for the same reasons judgment was given for the plaintiff."

the defendants, to restrain them from the imposition and collection of certain taxes, to pay instalments due upon a subscription made by the county of Forsythe to the North Western North Carolina Railroad Company. The following facts were found by the presiding Judge: 'A majority of the justices of the peace were present at the court house in Winston on the 25th day of March, 1868, and made an order to submit the question of subscription to the qualified voters of the county on the 4th day of April, 1868, and directed the sheriff to open the polls on that day.

That notice of this election was published in two newspapers, printed and circulated in that county; that said election was held at the time appointed, and at the usual places for holding elections in said county, and due return of the result of the voting was made to June Term of the County Court; that a majority of the jutices of the county were present, and on the bench at the said June Term, concurring in the orders made; that a large majority of the qualified voters of the county did vote on the question of subscription, and that a majority of the said votes were cast in favor of subscription; that a subscription of 1,000 shares of stock was made by the agent of the county appointed for that purpose on the_____day of June, 1868; that the defendants have laid taxes to pay the instalments due upon the subscription made to the North Western North Carolina Railroad Company for the years 1870-71.

Upon the foregoing state of facts the injunction, theretofore granted, was vacated by his Honor. Whereupon the plaintiffs appealed to the Supreme Court.

Several errors were assigned. The chief one and the only one discussed by the Court is: 'That the injunction was dissolved and defendants allowed to collect the taxes without any constitutional power in the legislature to authorize the subscription, and without a sufficient compliance with the acts of the General Assembly in that case made and provided.'

Scales & Scales and *Dillard & Gilmer*, for plaintiffs.

Clement, Masten and Batchelor, for defendants.

READE, J.: The main question is whether the legislature has the power to authorize the people of a county to take stock in a railroad, and to determine the question by a popular vote, and to tax themselves to pay for it. The Legislature in 1852 authorized the town of Newbern to take stock in the Neuse River

Navigation Company, for the use of the town, and to issue bonds and to levy a tax upon the property holders of the town to pay them. One of the taxpayers filed a bill to enjoin the collection of the tax, upon the ground that the act of the Legislature was unconstitutional. The question was fully argued and well considered, and the decision was in favor of the constitutionality of the act (*Taylor vs. Comrs. of Newbern*, 2 Jones Eq., 141).

And, again, in 1855, the Legislature chartered the Western North Carolina Railroad Company and authorized any county through which the road might pass to take stock if a majority of the justices of the peace and a majority of the voters should so determine, and to issue bonds and to levy a tax, &c. The county of Burke took stock, and one of the taxpayers filed a bill to enjoin, upon the ground that the act was unconstitutional. But this court decided in favor of the constitutionality of the act, and, in the opinion, it is said: 'In accordance with these views is the case of *Taylor vs. Newbern (supra)*, so that the question may be said to be settled here' (*Caldwell vs. Justices of Burke*, 4 Jones Eq., 323). The defendants' counsel cited, also, decisions in most of our sister States to the same effect. So that we repeat what was said in *Caldwell vs. Justices of Burke*, that the question is settled. We suppose that the plaintiffs' counsel felt at liberty to treat it as an open question, because in *Caldwell vs. Justices of Burke* there was a dissenting opinion by the present Chief-Justice; but the Court was unanimous upon this point. The dissenting opinion was only as to the power of a second vote of the people after they had rejected the proposition by a former vote.

There are divers other points in the complaint which seem to be unfounded, and besides they are unimportant. The main thing—the people's will—seems to have been fairly obtained. The stock was taken; bonds were issued; rights have vested; taxes have been levied and a portion of the installments have been paid, and taxes are now laid to pay other installments. The Board of Commissioners, who may be supposed to represent the popular will, are anxious to meet the obligations incurred, and the Court will not allow technical and frivolous objections, calculated to impair the public faith, to avail a *few*, who are indulged with

the privilege of suing for a *class*. Only their substantial rights will be considered.

We agree with his Honor that the injunction ought to have been dissolved.

There is no error. This will be certified, &c.

Simonton vs. Commissioners of Burke at this Term.

Per Curiam. Judgment affirmed."

NOTE that the subscription was made at the *June* Term, 1868, at which time the Ordinance was the only source of the authority to subscribe the stock and issue the bonds which were sustained in the *Hill* case just quoted, as well as in the *Belo* case next given, and where the facts relating to the subscription and bonds are more fully stated in the opinion of BYNUM, J.

The report of the *Belo case* is *verbatim* as follows:

"Edward Belo vs. The Commissioners of Forsythe County.

"[76 N. C., 489, January Term, 1877.]

"MUNICIPAL BONDS—CONDITIONS PRECEDENT—ACTION BY PURCHASER FOR VALUE—INJUNCTION BY TAX-PAYER—RETROSPECTIVE STATUTE—JUDGE'S CHARGE—EVIDENCE.

"1. Municipal bonds unpaid at maturity are dishonored like other commercial paper, and a purchaser after maturity holds them subject to all defects which would invalidate them in the hands of the original holder.

"2. In an action against a municipal corporation upon a bond issued by it, by a purchaser for value without notice, the plaintiff need only show a *power* in the corporate body to issue the bond.

"3. If a municipal corporation has the power to issue bonds upon certain conditions precedent, and such bonds are issued, the presumption is that the conditions were complied with and the bonds are *prima facie* valid. The corporation, however, can show the contrary, unless it is *estopped* by its own acts from so doing.

"4. When authority to issue municipal bonds upon the performance of certain conditions precedent is con-

ferred by statute upon a particular tribunal, such tribunal has the sole power to determine the fact whether the conditions have been performed or not."

"5. In an action by a *bona fide* purchaser for value against a County upon a bond issued by the former County Court of such County under an Act of the Legislature, the records of such Court are conclusive upon the County. The recitals in the bond are also conclusive upon the County and constitute an estoppel *in pais*.

"6. A taxpayer, for sufficient cause, can intervene in apt time and enjoin the issuing of municipal bonds, but this must be done before the bonds are issued and negotiated and pass into circulation as commercial securities.

"7. It is competent for the Legislature, by a retrospective statute, to validate an irregular or defective execution of a power by the authorities of a municipal corporation acting under a former statute where no contract is impaired, and the rights of third persons are not injuriously affected.

"8. Where the plaintiff testified on the trial below and introduced evidence of good character, and the defendant asked His Honor to charge the jury that they were not bound to believe the plaintiff in passing upon the issue, which His Honor refused, and charged the jury that 'they were not bound to believe anybody,' and added 'that, when men who have proved a good character before the jury testify, the presumption is that they will not lie,' &c. *Held*, not to be error.

> "*Chester & Lenoir R. R. Co. vs. Comrs. of Caldwell*, 72 N. C., 486, cited and approved.

"This was an Action for a Mandamus to compel the defendants to provide for the payment of certain bonds alleged to have been issued pursuant to law by the County of Forsythe, tried at Spring Term, 1876, of Davidson Superior Court, before CLOUD, *J.*

"The action was commenced in Forsythe and removed to Davidson.

"The question presented for the decision of this Court is so elaborately discussed by Mr. Justice BYNUM, in delivering the opinion, that a statement of the facts is deemed unnecessary.

"Upon the issues submitted, and under the instructions of His Honor in the Court below, the jury rendered a verdict for the plaintiff. Judgment. Appeal by the defendants.

"*Mr. J. M. McCorkle* for plaintiff.

"*Messrs. Dillard & Gilmer, Shipp & Bailey and Watson & Glenn* for defendants.

BYNUM, J.: The North Western North Carolina Railroad Company was incorporated by an ordinance of the Convention of 1868, and, by Section 12 of the charter, the same power to subscribe to the capital stock of the company and subject to the like regulations and restrictions is given to Counties and Towns as was conferred by an Act incorporating the Atlantic & N. C. Railroad Company, passed by the Legislature of 1852. By section 34 of the latter Act the Justices of the County through or near which the road was located, "a majority concurring," are authorized to fix upon a subscription sum and submit it to the voters of the County. If the majority favored subscription, the Justices were to choose an agent to subscribe the stock voted and to prepare and issue County bonds, as the Justices should direct. The minutes of the Special Term of the County Court of Forsythe County, which ordered the proposition to be submitted to the popular vote, recite that a majority of the Justices were present, concurring in the order. The vote resulted in favor of subscription, and was so certified to the succeeding Court, held in June, 1868.

The minutes of that Term recite that 35 Justices were present, which number is admitted to be a majority of the whole number. At this latter Term of the Court, the Justices ordered the subscription to be made to the capital stock of the Company, and the bonds to be prepared and issued and sold by the agent then chosen. The bonds were accordingly put upon the market, and among them the identical bonds now sued on were by the agent sold to one Lemly, at his Banking House in Salem, on 5th of March, 1869. These bonds recite that they were 'authorized by an ordinance of 1868, by an order of the Court of Pleas and Quarter Sessions of Forsythe County at June Term, 1868, and re-enacted and ratified and confirmed by an Act of the General Assembly, ratified the 11th of August, 1868'.

At the same Term at which the subscription was made, the Justices assessed a special tax upon the

County to meet the semi-annual interest on the bonds. This Special Railroad Tax was annually assessed, levied and collected and applied in the discharge of the accruing interest upon the bonds from that time until 1872. A certificate for the stock subscribed was issued by the Railroad Company to the County, which it yet holds; an agent was annually chosen to represent and did represent the County stock in all the meetings of the Company. Under the new State Constitution of 1868, a Board of County Commissioners succeeded to all the powers and duties of the Justices, and up to 1872 this Board unanimously caused the levy and collection of the Railroad Tax and its application to the discharge of the coupons due upon the bonds. But the Board elected in 1872 refused to assess any further tax and to pay any further interest upon the bonds, alleging as the reason therefor that the subscription of stock so made by the County was illegal and void.

I. The plaintiff purchased the bonds in suit of Lemly in May, 1873, *after* they fell due. The bonds were then dishonored, like other commercial paper remaining unpaid at maturity, and the plaintiff is a purchaser with notice of all defects which would invalidate them in the hands of Lemly. He acquired no better title than his transferror. Any defense which could be asserted against the claim of Lemly can be maintained by the County against the plaintiff (1 Daniel on Negotiable Instruments, Sec. 782; *Arrents vs. Commonwealth*, 18 Grat., 773; 14 Minn., 79). The question then is: were the bonds invalid in the hands of Lemly, who purchased them from the County before maturity? The defense to the action is that the election could be ordered and the subscription of stock made only by the concurrence of a majority of the Justices of the County, and that in point of fact no such majority did concur, and, therefore, the subscription and the bonds issued therefor are void, even in the hands of a *bona fide* holder of the bonds before they fell due. This proposition cannot be maintained. Municipal bonds are negotiable instruments, and the legal rights of the holders of such paper do not so much rest upon abstract propositions, though true, as upon a system of practical rules found by experience to be essential to healthy commercial life. For the public protection and the convenience of trade, every intendment is made in favor of the validity of negotiable instru-

ments. Where bonds have been issued and sold in the market, and have come into the hands of a *bona fide* holder before maturity, as a general rule such bonds are *prima facie* valid, and the *onus* is upon the party impeaching them to show the contrary. This rule, however, which subsists between individuals, is much modified in respect to corporate bonds. Such bonds can be issued only in pursuance of a special grant of power, and the party claiming the benefit of such bonds must show a *power* in the corporate body to issue them. But if he is a purchaser for value without notice and before maturity, he need do no more. If a municipal corporation has the power to issue bonds only on a compliance with conditions precedent, as, for instance, as here, in pursuance of a popular vote and the bonds are issued, the presumption is that the conditions have been observed and they are *prima facie* valid, though the defendant may show the contrary unless he is *estopped* by his own acts from doing so. The principle, however, of equitable estoppel is a most important element in the transaction. For whether conditions precedent have been complied with is a matter of fact to be determined by some tribunal invested with the power and authority to decide it, and the decision when made should be final. It is not disputed that the *power* to make the subscription of stock and issue the bonds was conferred upon the County of Forsythe by the Ordinance of the Convention. It is equally clear that the tribunal which was authorized to issue the bonds only on compliance with conditions precedent was the sole tribunal to determine the fact whether the conditions had been fulfilled. In our case the Justices of the County, a majority concurring, was the Court or tribunal designated to carry the law into effect, and was the tribunal to decide whether the conditions had been complied with, and their decision is final in a suit by a *bona fide* holder of the bonds against the municipality. This determination of a question of fact by the Justices is manifested in two ways: first, by the records of their Co rt, and, second, by the recitals in the bonds issued by them. The Justices were authorized by the Act to take the sense of the people, declare the result and issue the bonds. Their declaration spread upon the Minutes of the Court and made a record is conclusive against the County in favor of all *bona fide* bondholders without notice. If they purchased, before maturity, they

need look no further (*Marcy vs. Township of Oswego*, 92 U. S. Rep., 637; *Dunning vs. Houston*, 18 Am. Rep., 253, and note). If there was fraud in making the record, or irregularities in the election which would vitiate the bonds upon exceptions taken in apt time, any taxpayer of the County could intervene and enjoin their issue. But this could only have been done before the bonds were issued, negotiated and passed into circulation as commercial securities, with the insignia of validity impressed upon their face (*Chester & Lenoir R. R. Co. vs. Caldwell Co.*, 72 N. C., 486). If intentionally or by neglect the taxpayers fail to protest, interfere or assert their legal rights; if they suffer the election to be held, a false result declared, the bonds to be issued and sold, and the proceeds received by their agents; if for the period of four years they annually submit to a special tax, which is applied in payment of the accruing interest on the bonds; if they still retain the Railroad stock without an offer to surrender it and continue to have it represented in the meetings of the Company, they cannot now disaffirm the acts of their public agents who issued and negotiated the sale of the bonds. They had the opportunity to intervene and protect themselves before the rights of third persons accrued. Their acquiescence is a ratification by the principal of the acts of his agent, and, according to all the leading authorities upon this question, the doctrine of equitable estoppel is a complete bar, and is strictly applied to the enforcement of these municipal obligations (2 Daniel on Neg. Instr., Sec. 479; *State vs. Vanhorne*, 7 Ohio St., 331; *Barrett vs. County Court*, 44 Mo., 201).

While the decisions are very uniform that the record of the Justices Court affirming the fact of compliance with the conditions precedent to the subscription of stock is conclusive and estops the County from denying the validity of the bonds in the hands of a *bona fide* holder before maturity, they are equally uniform in giving the same effect to the *recitals* in the bonds themselves that they had been issued in pursuance of the law which authorized their issue. The recital is a determination of the question, and the holder has the right to rely on it (*Town of Coloma vs. Evans*, 92 U. S. Rep., 484; *Lynch vs. Winnebago*, 16 Wall., 13; *Knox County vs. Aspinwall*, 21 How., 539). In delivering the opinion of the Court in *Coloma vs. Evans*, Mr. Justice STRONG says: "In the

leading case of *Knox County vs. Aspinwall*, the decision was rested upon two grounds. One of them was that the mere issue of the bonds containing a recital that they were issued in pursuance of the Legislative Act was a sufficient basis for the assumption by the purchaser that the conditions on which the County was authorized to issue them had been complied with, and it was said the purchaser was not bound to look further for evidence of such compliance, though the recital did not affirm it. This position was supported by reference to the *Royal British Bank vs. Turquand*, 6 Ellis and Blackburn, 327, a case in the Exchequer Chamber, which fully sustains it and the decision in which was concurred in by all the Judges. This position has been more than once re-affirmed in this Court. It was in *Moran vs. Miami County*, 2 Black., 732; in *Mercer County vs. Hacket*, 1 Wall., 83; in *Supervisors vs. Schenck*, 5 Wall., 784, and in *Meyer vs. Muscatine*, 1 Wall., 384. It has never been overruled, and whatever doubts may have been suggested respecting its correctness to the full extent to which it has been sometimes announced, there should be no doubt of the entire correctness of the other rule asserted in *Knox vs. Aspinwall*. That has been so firmly seated in reason and authority that it cannot be shaken." To the same effect is the recent case of *Humbolt Township vs. Long*, 92 U. S. Rep., 642. See, also, a valuable summary of the doctrine as established by the decisions of the Supreme Court of the United States by Judge DILLON, 'Law of Municipal Bonds,' Sec. 11, the result of which is that the recitals in the bonds to that effect are conclusive of compliance with the conditions precedent, and constitute an estoppel *in pais* upon the municipalities.

Up to this point the discussion has been upon the idea that the bonds were, in fact, irregularly issued, and were good only in the hands of a *bona fide* purchaser before maturity and without notice. It may well be doubted whether this is not conceding too much. Suppose the plaintiff had been the original purchaser from the County after the bonds matured and, therefore, fixed with notice, and suppose, further, that the County, in defense, could go behind the action of the Justices and the recitals in the bonds, it by no means follows that their invalidity could then be established, for the County was clothed with the power to issue them, and it is admitted that a

majority vote sanctioned the subscription of stock and the issue of the bonds. The real condition precedent was the consent of the tax payers, and that had been thus regularly obtained. The provisions of the Act as to the mode of submitting the question were subordinate and conducive to the main purpose, and may, therefore, be properly considered as directory only and not of the essence. When the subscription was voted there is authority and reason for asserting that the Justices could have been compelled by process of law to make the subscription, unless in defense they could have shown that the election was not fairly conducted, but was influenced by the fraud of the Railroad Company (People vs. Supervisors, 27 Cal., 655). As the case is presented to us, that question does not arise, and we do not decide it.

So far, as to the rights of the parties under the original Act of the Railroad Corporation, granted by the Convention of 1868.

II. But the plaintiff further relies upon a subsequent Act of the Legislature, ratified the 11th of August, 1868, which confirms the original charter of March, 1868. This Act, in express terms 'ratifies all Acts and things heretofore done under the provisions of said ordinance,' and confers upon the 'Board of Commissioners of the County full power and authority to levy from time to time such tax as may be sufficient to pay the subscription made by said County to the capital stock of the North Western North Carolina Railroad Company and any interest due thereon, or to liquidate any debt created by the County in borrowing money to pay such stock subscription.'

The competency of the Legislature to enact retrospective statutes to validate an irregular or defective execution of power by a County corporation is well settled. In *St. Joseph Township vs. Rogers*, 16 Wall., 644, the election at which the subscription was approved was held before the law authorizing the subscription, and the Court there decide that this and all defective subscriptions of the kind may be ratified where the Legislature could have originally conferred the power, and that such laws, when they do not impair any contract or injuriously affect the rights of third persons are never objectionable (Dillon's Law of Municipal Bonds, Sec. 21; *Butler vs. Dubois*, 29 Ill., 105; 49 Mo., 225). The ratification operates as a previous author-

ity (2 Daniel on Neg. Instr., 492; Cooley on Const. Lim., Secs. 370-381; *Knap vs. Grant*, 27 Wis., 147).

Declaring, as we do, that the ratifying Act of August, 1868, was a curative Act, and validated both the County subscription and the issue of the bonds, if any defects existed therein—and it has been one purpose of this opinion to show that the bonds were valid in the hands of *bona fide* holders without the aid of this healing Act—the proposed evidence of the defendant became immaterial and irrelevant. As a matter of law, the bonds were valid and the Court did not err in so declaring.

The only issue submitted to the jury was: 'Is the plaintiff the *bona fide* owner and for value of the bonds and coupons mentioned in the pleadings, and was he such at the commencement of the action?' Upon the trial of this issue the plaintiff was introduced and testified as a witness. The defendant requested the Court to charge the jury that they were not bound to believe the plaintiff in passing upon the issue. The Court refused so to charge, but told the jury 'they were not bound to believe anybody, and added that, when men who have proved a good character before the jury testify, the presumption is that they will not lie, and that there was evidence before the jury that the plaintiff was a man of good character, and no witness had been introduced to assail his character.' There was no error in that. Without this reinforcement of a proved good character, men are presumed to tell the truth. The whole theory of jury trials, and, indeed, of all human intercourse, is based upon that presumption.

His Honor expressed himself with needless emphasis, but we do not see that the jury were misled thereby.

It is estimated that the municipal indebtedness of this country has already reached the enormous sum of $900,000,000, and is rapidly increasing, nearly the whole of which is evidenced by negotiable securities issued for almost every conceivable purpose by cities, counties and townships. These bonds represent a large portion of the wealth of the country, and, whether held for investment or active employment, they enter into the complex business of commercial life. This municipal power to issue bonds, which is the growth of the last thirty years, has already overwhelmed the country with an indebtedness which threatens political society and social order to their foundations. No check against our indebtedness is so effectual as that

you must pay as you go, but this is utterly disregarded in the legislation which authorizes the issue of bonds payable at a remote future period. As soon as the sting of taxation is felt, the self-burdened people cast about for relief, and, after some hesitating scruples, plunge into repudiation or other methods involving the sacrifice of public faith, with its dismal train of evils. No refuge for repudiation can be found in the legal tribunals of the country. They have sternly resisted every subterfuge to escape the just obligation of these contracts. No branch of the law has been more thoroughly investigated and discussed with the view of setting it upon a just and pure foundation. And it is the glory of the law that, while by the application of legal principles it enforces the discharge of such obligations, it at the same time preserves the public morals in maintaining the integrity of solemn contracts inviolable. In no other practical way perhaps will the taxpayers be sooner brought to a more vigilant watchfulness over their own affairs, and a more careful selection of their public agents (See Dillon on Municipal Bonds, Sec. 1).

There is no error.

Per Curiam. Judgment affirmed."

Supreme Court of the United States.

No. 247.—October Term, 1902.

The Board of Commissioners of Wilkes County and John H. Johnson, Sheriff and ex officio Treasurer of Wilkes County,
vs.
W. N. Coler & Company.

On writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[May 18th 1903.]

Mr. Justice Harlan delivered the opinion of the Court.

This is an action against Wilkes County, North Carolina, upon certain bonds, each reciting that it was issued in payment of the subscription by that county to the capital stock of the Northwestern North Carolina Railroad Company, "by authority of an act of the General Assembly of North Carolina, ratified the 20th day of February A. D. 1879, entitled 'An act to amend the charter of the Northwestern North Carolina Railroad for the construction of a second division from the towns of Winston and Salem, in Forsyth County, up the Yadkin Vally, by Wilkesboro, to Patterson's factory, Caldwell County,' and authorized by a vote of a majority of the qualified voters of Wilkes County, by an election regularly held for that purpose on the 6th day of November A. D. 1888, and by an order of the Board of Commissioners of Wilkes County made on the first day of April A. D. 1889."

Coler & Co., holders of some of the bonds, obtained a judgment against the county in the Circuit Court. The case was then carried to the Circuit Court of Appeals, which certified certain questions to this court under the Judiciary Act of March 3d 1891, c. 517. Those questions were answered, and the answers having been certified to the court below, the case was finally tried, resulting in the affirmance of the judgment against the county. *Wilkes County* v. *Coler*, 180 *U. S.* 506; *Board of Commissioners* v. *Coler*, 113 *Fed. Rep.* 725. It is now here on writ of certiorari sued out by Wilkes County.

The facts out of which this litigation arose are fully set forth in the former opinion. It is necessary to restate some of them as well as to recall the points heretofore decided.

It appears that the principal question in the case, when formerly here, was as to the effect of the recitals in the bonds.

The plaintiffs contended that being *bona fide* holders they were entitled to assume that there had been a compliance with all the provisions of the

act of February 20th 1879, upon the authority of which the bonds purported to have been issued.

The defendant contended that as the journals of the respective houses of the Legislature did not show that the yeas and nays were entered on the second and third readings of the bill subsequently published as the act of February 20th 1879, that act was void under section 14 of Article 2 of the State constitution, providing that "No law shall be passed . . to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so, unless the bill for that purpose shall have been read three several times in each house of the General Assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal."

This contention of the county was supported by several decisions of the Supreme Court of North Carolina that are referred to in our former opinion; and one of the questions propounded to this court was whether the Circuit Court should accept those decisions as controlling in respect of the alleged invalidity of the act of 1879. That question was answered in the affirmative, this court being of opinion that as matter of propriety and right the decision of the State court on the question as to what is a *law* of the State was binding upon the courts of the United States. 180 *U. S.* 506, 526.

That answer, of course, eliminated from the case the act of 1879 as giving authority to issue the bonds in suit; and it, therefore, became necessary to inquire whether such authority could be found elsewhere in the legislation of the State—this court being of opinion that the invalidity of the act of 1879, as conferring power to issue the bonds, did not estop holders of bonds from showing that there was in fact ample authority to issue them.

It was insisted that sufficient authority was to be found in the Ordinance of March 8th 1868, passed by the Convention that assembled at Raleigh, North Carolina, on January 14th 1868, for the purpose of framing a constitution for that State.

By that Ordinance, which took effect from its passage, it was provided: "That for the purpose of constructing a railroad of one or more tracks, from some point on the North Carolina Railroad, between the town of Greensboro, in Guilford County, and the town of Lexington, in Davidson County, running by way of Salem and Winston, in Forsyth County, to some point in the northwestern boundary line of the State, to be hereafter determined, a company is hereby incorporated under the name and style of the Northwestern North Carolina Railroad Company, with a capital stock of two millions of dollars, which shall have a corporate existence as a body politic, for the space of ninety-nine years, . . § 1. . . That

the capital stock of said company may be created by subscriptions on the part of individuals, corporations and counties, in shares of one hundred dollars. §2. . . That after the organization of said company and the election of the president and other necessary officers, the officers so elected shall proceed, under the advice of the directors, to locate the eastern terminus of the Northwestern North Carolina Railroad, and shall proceed to construct said road, with one or more tracks, as speedily as practicable, in sections of five miles each, to the towns of Winston and Salem in Forsyth County, which portion of said railroad, when completed, shall constitute its first division: *Provided*, That if the distance from the nearest section to the towns of Winston and Salem be less than five miles, the same shall be considered a section. §5. . . That the stockholders of said company may pay the stock subscribed by them either in money, labor or material for constructing said road, as the board of directors may determine, and that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, [Atlantic and North Carolina Railroad Company,] for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company. §12. . . That the company shall have power to construct branches of said road, one of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surry County, to the line of the State of Virginia." §13.

The act incorporating the Atlantic and North Carolina Railroad Company, referred to in the Ordinance of 1868, was passed in 1852. *Laws of N. C.* 1852, *pp.* 484, 499. By section 33 of that act it was made "lawful for any incorporated town or county near or through which said railroad may pass to subscribe for such an amount of stock in said company as they shall be authorized to do by the inhabitants of said town or the citizens of said county, in manner and form as hereinafter provided." By section 35 it was provided "that if upon the return of such constable . . it shall appear that a majority of the qualified voters of such town and by the return of the sheriff that a majority of the qualified voters of such county voting upon the question are in favor of the subscription, the corporate authorities of such town, and the justices of such county shall appoint an agent to make the subscription in behalf of such town and county, to be paid for in the bonds of such town and county and on such time as shall be agreed on by said town officers and the justices of such county." *Laws N. C.* 1852, *c.* 136.

After referring to certain decisions of the Supreme Court of North Carolina, relating to the Ordinance of 1868—particularly *Hill* v. *Com'rs*, 67 *N. C.* 367, and *Belo* v. *Com'rs*, 76 *N. C.* 489—we said: "It results that when the bonds here in question were issued in 1889, it was the law of North Caro-